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**THE DOCTRINE OF *RES JUDICATA*
BEFORE INTERNATIONAL ARBITRAL
TRIBUNALS**

PHD THESIS

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I hereby declare that the work presented in this thesis is my own

ABSTRACT

There are currently no rules in international commercial arbitration law and practice assuring the coordination between (partial or final) arbitral awards and/or national court judgments rendered in identical or related cases. This lack of coordination is unsatisfactory, particularly in light of the ever-growing tendency of parties to submit their commercial disputes to international arbitration and the increasing complexity of international arbitration. Today, international commercial transactions and the disputes to which they give rise regularly involve multiple parties, contracts and issues. As a consequence, these disputes (or certain aspects of these disputes) are increasingly tried in multiple fora. In such circumstances, difficult issues regarding the *res judicata* effects of prior judgments or awards are likely to arise before international commercial arbitral tribunals.

The central hypothesis underlying this research is that transnational principles of *res judicata* should be elaborated for international commercial arbitral tribunals. This solution is justified for several reasons. First, it is justified given the differences among domestic laws regarding *res judicata* and the difficulties surrounding the formulation of appropriate conflict-of-laws rules. Second, it avoids inappropriate analogies between international arbitration proceedings and litigation. Finally, the solution provides guidance and ensures a certain degree of fairness, certainty and predictability, which is expected by arbitration users.

This PhD thesis seeks to achieve its aims in two stages: Part One examines the doctrine of *res judicata* in litigation, analysing the doctrine as applied in different domestic laws, as well as in private and public international law. Part Two will determine whether and to what extent the *res judicata* doctrine may be applied by international commercial arbitral tribunals. It will demonstrate that transnational principles of *res judicata* should be elaborated and will seek to formulate such principles.

*The Moving Finger writes; and, having writ,
Moves on: nor all your Piety nor Wit
Shall lure it back to cancel half a Line,
Nor all your Tears wash out a Word of it.*

(Omar Khayyám)

TABLE OF CONTENTS

| | |
|--|-----------|
| Introduction..... | 1 |
| Part I : The Doctrine of <i>Res Judicata</i> in Litigation | 10 |
| Chapter 1: The Doctrine of <i>Res Judicata</i> in Domestic Laws..... | 14 |
| 1. Common Law | 15 |
| 1.1. England | 15 |
| 1.1.1. Constituent elements of a <i>res judicata</i> | 15 |
| 1.1.2. Effects of a <i>res judicata</i> | 19 |
| 1.1.3. The same parties..... | 25 |
| 1.2. United States | 28 |
| 1.2.1. Constituent elements of a <i>res judicata</i> | 29 |
| 1.2.2. Effects of a <i>res judicata</i> | 32 |
| 1.2.3. The same parties..... | 34 |
| 2. Civil Law | 39 |
| 2.1. France | 39 |
| 2.1.1. Constituent elements of a <i>res judicata</i> | 40 |
| 2.1.2. Effects of a <i>res judicata</i> | 44 |
| 2.1.3. Requirements for the application of the doctrine of <i>res judicata</i> | 45 |
| 2.2. Switzerland | 49 |
| 2.2.1. Constituent elements of a <i>res judicata</i> | 50 |
| 2.2.2. Effects of a <i>res judicata</i> | 53 |
| 2.2.3. Requirements for the application of the doctrine of <i>res judicata</i> | 54 |
| 3. Conclusion | 56 |
| Chapter 2: The Doctrine of <i>Res Judicata</i> in International Law..... | 60 |
| 1. Private international Law | 61 |
| 1.1. The EC Regulation No. 44/2001 | 61 |
| 1.2. The Convention on Choice of Court Agreements | 67 |
| 1.3. The ALI/UNIDROIT Principles of Transnational Civil Procedure | 71 |
| 2. Public International Law..... | 73 |
| 2.1. Constituent Elements of a <i>Res Judicata</i>..... | 76 |

| | |
|--|-----|
| 2.2. Effects of a <i>Res Judicata</i> | 83 |
| 2.3. Requirements for the Application of the Doctrine of <i>Res Judicata</i> | 85 |
| 3. Conclusion | 93 |
| Part II : The Doctrine of <i>Res Judicata</i> in International Commercial Arbitration | 95 |
| Chapter 3 : <i>Res Judicata</i> Issues Arise in International Commercial Arbitration | 97 |
| 1. Issues of <i>Res Judicata</i> Between Arbitral Tribunals and State Courts..... | 98 |
| 2. Issues of <i>Res Judicata</i> Between Different Arbitral Tribunals..... | 101 |
| 3. Issues of <i>Res Judicata</i> Before a Same Arbitral Tribunal..... | 105 |
| 4. Conclusion | 105 |
| Chapter 4 : <i>Res Judicata</i> in International Commercial Arbitration – A Problem..... | 107 |
| 1. Interests at Stake Due to the Occurrence of <i>Res Judicata</i> Issues in International Commercial Arbitration | 108 |
| 2. How are <i>Res Judicata</i> Issues Currently Dealt With in International Commercial Arbitration Law and Practice?..... | 112 |
| 2.1. International Commercial Arbitration Law | 112 |
| 2.1.1. Domestic Arbitration Laws | 113 |
| 2.1.2. Institutional Arbitration Rules | 133 |
| 2.1.3. International Commercial Arbitration Conventions..... | 135 |
| 2.1.4. International Arbitration “Soft Law”: The ILA Reports and Recommendations on <i>Res Judicata</i> and Arbitration | 137 |
| 2.1.5. Conclusion | 138 |
| 2.2. International Commercial Arbitration Practice | 140 |
| 2.2.1. Which law governs <i>res judicata</i> issues in arbitration proceedings? | 141 |
| 2.2.2. Which <i>res judicata</i> requirements must be met before international arbitral tribunals? | 147 |
| 2.2.3. To what extent have international arbitral tribunals afforded <i>res judicata</i> effects to prior decisions? | 154 |
| 2.2.4. In what circumstances have international arbitral tribunals denied <i>res judicata</i> effects to prior decisions that were <i>res judicata</i> ? | 156 |
| 2.2.5. What effects have international arbitral tribunals afforded to prior decisions that were not <i>res judicata</i> ? | 157 |
| 2.2.6. Conclusion | 159 |

| | |
|--|-----|
| 3. Conclusion | 161 |
| Chapter 5 : Search for an Appropriate Approach | 164 |
| 1. Possible Approaches to <i>Res Judicata</i> Before International Arbitral Tribunals. 164 | |
| 1.1. Conflict-of-laws Approach | 167 |
| 1.2. Comparative Law Approach | 172 |
| 1.3. Transnational Approach | 173 |
| 2. The Appropriate Approach: Transnational <i>Res Judicata</i> Principles for International Commercial Arbitration | 175 |
| 2.1. Analogy between International Commercial Arbitration and Domestic Litigation for <i>Res Judicata</i> Purposes | 176 |
| 2.1.1. What is international arbitration? | 176 |
| 2.1.2. Fundamental features of international commercial arbitration | 178 |
| 2.1.3. Conclusion | 202 |
| 2.2. Sources of Transnational <i>Res Judicata</i> Principles | 203 |
| 2.3. Legal Basis for the Application of Transnational <i>Res Judicata</i> Principles . | 206 |
| 3. Conclusion | 208 |
| Chapter 6 : Transnational <i>Res Judicata</i> Principles for International Commercial Arbitral Tribunals | 210 |
| 1. <i>Res Judicata</i> in Case of Prior State Court Judgments Before International Arbitral Tribunals | 211 |
| 1.1. Constituent Elements of a <i>Res Judicata</i> | 214 |
| 1.1.1. A judicial decision | 214 |
| 1.1.2. A judicial tribunal | 215 |
| 1.1.3. A final and conclusive decision | 215 |
| 1.1.4. A judicial tribunal with jurisdiction over the parties and the subject matter? | 216 |
| 1.1.5. A decision “on the merits” | 217 |
| 1.2. The Scope of <i>Res Judicata</i> Effects to be Afforded to Prior Judgments in Arbitration Proceedings | 229 |
| 1.3. Requirements for the Application of the <i>Res Judicata</i> Doctrine | 234 |
| 1.3.1. The triple identity test | 235 |
| 1.3.2. Is the prior judgment capable of recognition in the country of the arbitral | |

| | |
|---|------------|
| seat? | 241 |
| 1.4. Conclusion..... | 243 |
| 2. <i>Res Judicata</i> in Case of Prior Arbitral Awards Before International Arbitral Tribunals | 244 |
| 2.1. Constituent Elements of a <i>Res Judicata</i> | 245 |
| 2.1.1. An arbitral award..... | 245 |
| 2.1.2. A final and binding arbitral award | 247 |
| 2.1.3. A valid arbitral award..... | 249 |
| 2.1.4. An arbitral tribunal with jurisdiction over the parties and the subject matter?..... | 250 |
| 2.1.5. An arbitral award “on the merits” | 251 |
| 2.2. The Scope of <i>Res Judicata</i> Effects to be Afforded to Prior Arbitral Awards in Arbitration Proceedings | 258 |
| 2.3. Requirements for the Application of the <i>Res Judicata</i> Doctrine..... | 263 |
| 2.3.1. The triple identity test | 263 |
| 2.3.2. Is the prior award capable of recognition in the country of the arbitral seat of the subsequent arbitration?..... | 265 |
| 2.4. Conclusion..... | 267 |
| 3. Transnational <i>Res Judicata</i> Principles for International Commercial Arbitral Tribunals | 269 |
| 3.1. Transnational <i>Res Judicata</i> Principles with Respect to Prior National Court Judgments | 269 |
| 3.2. Transnational <i>Res Judicata</i> Principles with Respect to Prior Arbitral Awards..... | 271 |
| Conclusion..... | 274 |
| BIBLIOGRAPHY | 278 |
| TABLE OF CASES..... | 308 |
| TABLE OF ABBREVIATIONS..... | 334 |

INTRODUCTION

*We are not final because we are infallible, but
we are infallible only because we are final.*

(Robert H. Jackson J.)

1. International arbitration is widely considered to be the principal method of dispute resolution for international commercial disputes. Every year international arbitration institutions report increasing activity and new arbitration institutions are established “to catch this wave of new business”¹.

2. As a consequence of this ever-growing tendency of parties to submit their commercial disputes to international arbitral tribunals, international arbitration has also become increasingly complex. Today international commercial transactions and the disputes to which they give rise regularly involve multiple parties, contracts and issues². One aspect of this growing complexity is the increasing number of multi-fora disputes, *i.e.* disputes which (or aspects of which) are tried in two or more fora³. When disputes involve multiple parties, contracts or issues, conflicts concerning the proper forum to deal with such disputes are likely to arise. Sometimes it may simply be impossible to bring such multiparty, multicontract or multi-issue arbitrations to one single forum.

¹ REDFERN/HUNTER/BLACKABY/PARTASIDES, para. 1.01. See also NICHOLAS/LUKER, p. 6.

² On the issue of “multiparty, multicontract and multi-issue” arbitrations see, in particular, HANOTIAU, *Complex Arbitrations*. A growth in multiparty cases has been observed over recent years. For instance, the ICC has observed a continuing increase in multiparty cases in 2009, with the number of multiparty cases accounting for slightly less than a third of all cases (ICC, *2009 Statistical Report*, p. 9). The number of cases involving multiple contracts has also increased (see, *e.g.*, WHITESELL/SILVA-ROMERO, p. 7).

³ SCHNEIDER, p. 101. See also LIATOWITSCH/BERNET, p. 142.

Thus, the same or a related dispute might be brought before an arbitral tribunal and a state court or before different arbitral tribunals.

3. Difficult questions may arise from this situation: if a court renders a decision on the jurisdiction of the arbitral tribunal, would the arbitrators be bound by the prior decision or could they decide anew whether they have jurisdiction? If the arbitrators are bound by a prior judgment denying arbitral jurisdiction, the parties' arbitration agreement may be frustrated. On the other hand, if the arbitrators are not bound by the prior judgment and decide that there is a valid arbitration agreement, parallel court and arbitration proceedings on the merits may ensue. This may result in a waste of valuable resources and contradictory decisions on the merits. The parallel enforcement in different countries of such contradictory decisions may give rise to even further problems. To avoid such results, should arbitral tribunals be bound by a prior judgment on the merits of the dispute? If so, under which conditions and to what extent? Would the answers to the above questions be different if the prior decisions were rendered not by a state court but by another (or the same) arbitral tribunal?

4. The above questions all concern the finality of judgments and awards; they all raise issues of *res judicata* before an international arbitral tribunal. Arbitrators will find little guidance as to how to efficiently resolve these issues in international arbitration law and practice in its current state. However, the finality of decisions is fundamental in any legal system as it ensures fairness, efficiency, certainty and predictability in the dispute resolution process. Adequate solutions for dealing with *res judicata* issues in international arbitration must therefore be found.

5. The way in which *res judicata* issues are currently dealt with differs from one arbitral tribunal to another. This might create feelings of uncertainty and unpredictability among arbitration users which is potentially harmful for international arbitration. Parties to arbitration proceedings expect to be treated fairly and equally, especially since at the end of the arbitration there will be a final and binding award determining their legal rights, and this award will be enforceable virtually worldwide⁴. Pre-established *res judicata* principles will provide the fairness, certainty and predictability

⁴ PARK, *e.g.*, para. 7-23 and para. 7-33.

that arbitration users expect. They will give guidance to international arbitrators, especially in cases where the participants to the arbitration come from different legal backgrounds, have different expectations as to how the proceedings should be conducted or have never participated in an international arbitration before.

6. The central thesis underlying this research is that transnational principles of *res judicata* should be elaborated for international arbitral tribunals. The main difficulty of this solution is to determine the content of these principles. However, this solution is justified for several reasons. First, it is warranted because of the differences among domestic laws regarding *res judicata* and the difficulties surrounding the formulation of appropriate conflict-of-laws rules. As will be discussed in chapter five of this research, none of the possible applicable laws, *i.e.* the law of the place of arbitration, the law of the place where the first decision was rendered or the law governing the merits of the dispute, appears to have an undisputable interest in governing *res judicata* before international arbitral tribunals. Second, this solution would respect the autonomy of international arbitration by avoiding inappropriate analogies with litigation. Finally, this solution provides guidance and ensures a certain degree of fairness, certainty and predictability.

Literature review

7. The subject of *res judicata* before international arbitral tribunals has been discussed in several articles⁵. In particular, the International Law Association (ILA) has worked on the subject.

8. In 2006 the ILA International Commercial Arbitration Committee adopted six recommendations on *res judicata* for international arbitrators. The recommendations are based on two reports on *res judicata* and arbitration presented at the ILA Berlin

⁵ See, *e.g.*, BREKOULAKIS, pp. 177 *et seq.*; BORN, pp. 2879 *et seq.*; GALLAGHER, pp. 329 *et seq.*; HANOTIAU, *Complex Arbitrations*, pp. 239 *et seq.*; HANOTIAU, *The Res Judicata Effect of Arbitral Awards*, pp. 45 *et seq.*; HASCHER, pp. 17 *et seq.*; HOWELL, pp. 153 *et seq.*; HULBERT, pp. 155 *et seq.*; JARROSSON, *L'autorité de la chose jugée des sentences arbitrales*; KREHMSLEHNER, pp. 127 *et seq.*; LOWE, pp. 38 *et seq.*; LOWENFELD, pp. 55 *et seq.*; MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage international*, pp. 185 *et seq.*; PINNA, pp. 697 *et seq.*; REDONDO, pp. 1131 *et seq.*; SERAGLINI, pp. 909 *et seq.*; SHEPPARD, *The Scope and Res Judicata Effect of Arbitral Awards*, pp. 263 *et seq.*; SHELL, pp. 623 *et seq.*; SÖDERLUND, pp. 301 *et seq.*; STIER, pp. 321 *et seq.*; TRAIN, *L'autorité positive de la sentence arbitrale*, pp. 115 *et seq.*; VEEDER, pp. 73 *et seq.*

Conference in 2004 and the ILA Toronto Conference in 2006 respectively⁶.

9. The Interim Report on *res judicata* and arbitration begins with a conceptual introduction of the doctrine of *res judicata* followed by a presentation of situations in which *res judicata* issues may arise in international arbitration. The Report then examines and compares the doctrine in different domestic laws and international law. The third part of the Interim Report briefly analyses the doctrine of *res judicata* in international arbitration law and practice. Finally, in the fourth part of the Report, key issues concerning the application of *res judicata* in arbitration are raised.

10. The Final Report on *res judicata* and arbitration explains the scope and comments on the recommendations.

11. The scope of the ILA recommendations is limited. They “concern the effect of an international commercial arbitral award upon further or subsequent arbitration proceedings between the same parties”⁷. In particular, they concern the situation where *res judicata* issues arise between different arbitral tribunals, as well as within the same arbitration. However, the recommendations do not deal with the relationship between state courts and arbitral tribunals and they apply only to international commercial arbitration, to the exclusion of international investment arbitration.

12. The ILA recommendations are transnational in nature and designed for international commercial arbitration. Therefore, within their scope, the recommendations cover only those aspects of *res judicata* in international commercial arbitration where the Committee considered that transnational rules could be developed. Those aspects where the Committee felt that the development of transnational rules is premature and reference to conflict rules is more appropriate are not covered by the recommendations⁸.

13. The ILA reports and recommendations on *res judicata* and arbitration by no means constitute a comprehensive study of the subject of *res judicata* before

⁶ ILA, *Interim Report*; ILA, *Final Report*. See also SERAGLINI, pp. 909 *et seq.*; DE LY/SHEPPARD, pp. 1 *et seq.*; BENSUAUDE, *ILA Recommendations*, pp. 415 *et seq.*

⁷ ILA, *Final Report*, para. 9.

⁸ See ILA, *Final Report*, paras 5 *et seq.* and para. 28.

international arbitral tribunals. They leave many important questions unanswered, such as the question of the law governing *res judicata* or the question of the *res judicata* effect of prior court judgments on arbitral proceedings. They have been described as “*une oeuvre inachevée*”⁹.

Aim of the thesis

14. The purpose of this thesis is to investigate whether and how the doctrine of *res judicata* should be applied by arbitral tribunals in their relations with other arbitral tribunals or state courts and within the arbitral proceedings pending before them. The aim is to demonstrate that *res judicata* issues in international commercial arbitration should not be governed by any particular domestic law designed for the relations between domestic courts. The ultimate goal is to identify transnational principles of *res judicata* adapted to the nature of international arbitration. The principles identified in this thesis will take the form of guidelines for international arbitrators. Their aim will be to incite the creation of a coherent international arbitration practice for matters of *res judicata*.

Methodology

15. This thesis will seek to achieve its aim in two stages: part one examines and compares the doctrine of *res judicata* in litigation, and part two deals with the doctrine of *res judicata* in international commercial arbitration. The reasons behind this approach are outlined below.

16. One aim of this thesis is to investigate whether and how the *res judicata* doctrine as developed in litigation should apply in international arbitration. This can only be done after examining how the doctrine of *res judicata* is applied in litigation, in both a domestic and international law setting.

17. Part One commences by determining how the doctrine is applied in domestic laws. This is the logical starting point given the fact that the *res judicata* concept

⁹ SERAGLINI, p. 917.

originally came into being in a domestic setting¹⁰. Chapter One examines the requirements and effects of a *res judicata* in different domestic laws. It will reveal similarities and differences regarding the *res judicata* doctrine between domestic laws. This will serve the aim of this thesis in several ways. First, it will give a clear understanding of the doctrine of *res judicata* which is at the heart of this thesis. In particular, it will clarify the doctrine's meaning and purpose. Second, it will establish that there is no uniform doctrine of *res judicata*. In the second part of this thesis, this will be used as an argument to support the transnational approach toward *res judicata* and against the application of domestic *res judicata* rules in international commercial arbitration. Third, the similarities between domestic *res judicata* rules indicate the existence of some generally accepted principles. This will serve as a source of inspiration; it will help determine the content of transnational *res judicata* principles for international commercial arbitration.

18. The thesis will compare the domestic laws of England, the United States, France and Switzerland. These laws were chosen for several reasons: first, they constitute major representatives for two of the most important legal families, *i.e.* the common law system on the one hand and the civil law system on the other hand. In addition, within the civil law family, France represents the Romanic law system, while Switzerland represents the Germanic law system. Second, the legal systems of England, the United States, France and Switzerland are all highly developed and are thus comparable as between each other. Third, they all enjoy leading positions in the field of international arbitration.

19. After the comparison of domestic laws, Chapter Two will proceed to examine the *res judicata* doctrine in international law. The analysis will cover both private and public international law. The aim will be to determine how the domestic law doctrine has been introduced and is applied in international law, *i.e.* outside its original domestic law setting. This may serve as an inspiration as to how to introduce the *res judicata* doctrine into international arbitration. It will also help to determine the content of a general principle of *res judicata* in international law. In private international law, attempts

¹⁰ SÖDERLUND, p. 302.

have been made to harmonise rules of civil procedure, including *res judicata*. These general principles and attempts of harmonisation will be a useful source of inspiration for the determination of *res judicata* principles for international arbitration.

20. The second part of the thesis will examine whether and how the doctrine should apply in international commercial arbitration. Chapter Three will demonstrate the existence of *res judicata* issues in international commercial arbitration by identifying situations in which such issues may arise before international commercial arbitral tribunals. The purpose is to demonstrate the reality and magnitude of the phenomenon of *res judicata* in international commercial arbitration and to identify the setting in which *res judicata* issues arise before international arbitral tribunals. Chapter Four will then discuss the current situation and its consequences to show that the occurrence of *res judicata* issues in international commercial arbitration constitutes a problem that needs to be solved. In Chapter Five the thesis will then discuss the proper approach to *res judicata* before international arbitral tribunals. It will demonstrate that transnational principles of *res judicata* should be elaborated. Finally, Chapter Six will seek to formulate such principles.

Scope of the thesis

21. The thesis will take the perspective of an international commercial arbitral tribunal in circumstances where the same dispute or matter has already been decided by the same arbitral tribunal or by another arbitral tribunal or state court. Due to the limited scope of this research, the thesis will not analyse the perspective of a state court confronted with a prior arbitral award. Likewise, this thesis will not cover investment arbitration.

Terminology

22. As the doctrine of *res judicata* varies among domestic laws and international law in its interpretation and application, so also the terminology may vary from one jurisdiction to another. It is therefore essential to clarify the sense in which the term “*res judicata*” will be used in this research.

23. In this thesis the term “*res judicata*” will receive a broad meaning, covering all of

the various possible binding effects of a judgment or award on subsequent arbitral proceedings¹¹. This means that the term “*res judicata*” as used in this thesis will cover both the conclusive and preclusive effects of a prior judgment or award. In other words, this thesis will discuss both the positive effect of *res judicata*, allowing a claimant to rely on a previous decision to further the development of his case, and the negative effect of *res judicata*, allowing the defendant to stop the re-opening of a matter which has already been decided in previous proceedings. It also means that the term will cover not only the plea of cause of action estoppel (claim preclusion), but also the pleas of issue estoppel (issue preclusion) and abuse of process, which are known in some common law countries, but are generally unknown in civil law countries.

24. While it is useful for reasons of simplicity and convenience to use the term “*res judicata*” in this broad sense, it is important to set out the limits of this term and distinguish *res judicata* from similar concepts. The final ILA report distinguishes *res judicata* from

- the doctrine of *stare decisis*, *i.e.* invoking previous decisions rendered between different parties as persuasive precedent;
- correction of prior decisions rendered between the same parties in order to have an error in the decision corrected;
- interpretation of decisions rendered between the same parties in order to obtain a clarification of the meaning and scope of such decisions;
- supplementation of decisions rendered between the same parties in order to obtain an additional decision regarding claims formulated during the proceedings but not dealt with in the decision;
- revision of decisions rendered between the same parties on the basis of facts discovered after the rendering of the decision that were unavailable at the time of rendering of the decision and which the party invoking the facts was unaware of and could not

¹¹ HARNON, p. 539.

reasonably be expected to have been aware of at the time the decision was made;

- remission of arbitral awards rendered between the same parties to the arbitral tribunal for reconsideration in order to avoid partial or complete setting aside¹².

In addition, it is useful to distinguish *res judicata* from enforcement which can be described as “[t]he act or process of compelling compliance with a law, mandate, command, decree, or agreement”¹³. *Res judicata* and enforcement are interrelated; they are “two sides of the same coin”¹⁴. The existence of a judgment that is *res judicata* is a condition precedent to enforcement. This means that a judgment is enforceable only against those parties that are bound by the *res judicata*. This does not mean, however, that *res judicata* and enforceability describe the same effect. Both effects implement the authoritative determination of a decision. However, unlike *res judicata*, the enforcement of a judgment usually requires a court order (*exequatur*)¹⁵ that compels compliance with the judgment¹⁶.

¹² IIA, *Final Report*, para. 16.

¹³ BLACK'S LAW DICTIONARY.

¹⁴ BREKOULAKIS, p. 185.

¹⁵ BREKOULAKIS, p. 185.

¹⁶ On the distinction between *res judicata* and enforceability see also PERROT/FRICÉRO, para. 6.

PART I

The Doctrine of *Res Judicata* in Litigation

Important though the issues may be, how extensive so ever the evidence, whatever the eagerness for further fray; society says: "We have provided courts in which your rival contentions have been heard. We have provided a code of law by which they have been adjudged. Since judges are fallible human beings, we have provided appellate courts which do their own fallible best to correct errors. But in the end you must accept what has been decided. Enough is Enough. And the law echoes: res judicata, the matter is adjudged".

(Lord Simon of Glaisdale)

25. Literally translated, the Latin term *res judicata* means "a matter adjudged". The full maxim is *res judicata pro veritate accipitur* which means "a matter adjudged is taken as

truth”¹⁷. As noted by Barnett, the doctrine of *res judicata* is of ancient origin and application: recognised by the Roman jurists¹⁸, as well as in ancient Hindu texts and Greek custom, the doctrine reflects “a wisdom that is for all time”¹⁹.

26. There exists a certain “core of common agreement”²⁰ on the *res judicata* doctrine. The general idea underlying the doctrine is that a particular matter once settled by a judgment, decree, award, or other determination, must be regarded as final²¹; the matter cannot be re-litigated again between the persons bound by the decision²². Today, this general principle is well established in common law and civil law countries and is sometimes considered inherent to all legal systems²³. It is widely recognised as a general principle of law in the sense of Article 38 (1)(c) of the ICJ Statutes²⁴.

27. The doctrine of *res judicata* generally applies only where a given matter falls for decision twice within one and the same legal context²⁵. Generally, this means that the doctrine applies only where the parties and the questions at issue are identical in the prior and subsequent proceedings. Where this is the case a decision that qualifies as a *res judicata* is both conclusive and preclusive in subsequent proceedings. It is conclusive because it is final and binding upon the parties. A party may invoke an earlier decision in subsequent proceedings to develop its case (positive *res judicata* effect). It is preclusive because it bars the re-litigation of a matter that has already been finally decided in prior proceedings (negative *res judicata* effect)²⁶.

28. The *res judicata* doctrine provides for the finality of decisions with the aim to avoid lengthy and wasteful repetitions of proceedings leading to legal uncertainty and,

¹⁷ SHANY, *Competing Jurisdictions*, fn 5, p. 22.

¹⁸ On *res judicata* in Roman Law, see, e.g., HANDLEY, paras 27.01 *et seq.*

¹⁹ BARNETT, para. 1.12.

²⁰ SCOBIE, p. 301.

²¹ GALLAGHER, para. 17-11.

²² HANDLEY, para. 1.01.

²³ SCHREUER/REINISCH, p. 4; BARNETT, para. 1.12; HABSCHEID, *L'autorité de la chose jugée en droit comparé*, p. 179; EL OUALI, p. 73 (“*L'autorité de la chose jugée est un principe dont n'importe quelle organisation judiciaire, rudimentaire soit-elle, ne peut se passer*”); *Gates v Mortgage Loan and Insurance Agency, Inc*, 200 Ark 276, 285 (“The doctrine of *res judicata* is a principle of universal jurisprudence forming part of the legal systems of all civilized nations. It may be said to inhere in them all as an obvious rule of expediency and justice”).

²⁴ CHENG, p. 336; HANOTIAU, *Complex Arbitrations*, p. 239; REINISCH, p. 44; VULLIEMIN, paras 412 *et seq.*

²⁵ LOWE, p. 40.

²⁶ ILA, *Final Report*, para. 15. See also BREKOULAKIS, pp. 183 *et seq.*

perhaps, irreconcilable decisions. This need for finality was pertinently expressed by Andrews:

“Without finality of decision, litigants and indeed the legal system as a whole would be exposed to many hazards: that a dispute might continue to drag on; greater legal expense and delay might result; scarce judge-time might be spent re-hearing the matter; inconsistent decisions might follow; litigation would cease to be a credible means of settling disputes; the victorious party in the first case would be deprived of the legitimate expectation that the first action would not be merely a dress rehearsal for further contests”²⁷.

29. The doctrine of *res judicata* is generally considered to be based on a public and a private interest²⁸. The public interest requires that there be an end to litigation to ensure general security and public good. It is in the interest of society that the courts work in a way that is efficient and economic. As overburdened courts are having difficulty giving litigants even one day in court at present, allowing litigants a second day is a luxury that cannot be afforded²⁹. Furthermore, the public interest requires the avoidance of inconsistent judgments as inconsistencies may undermine the credibility of the courts and diminish respect and obedience of court judgments³⁰. It generally does not matter whether the decision is correct in law or fact. A competent court has the jurisdiction to decide wrongly, as well as correctly, and its decisions are final and binding unless corrected on appeal³¹.

30. The private interest is to protect the individual. It ensures that no person shall be vexed by more than one litigation on the same matter³².

31. It is difficult to give a general description of the *res judicata* doctrine that goes

²⁷ ANDREWS, p. 942.

²⁸ *Interest res publicae ut finis litium sit* (“it is in the public interest that there should be an end to litigation”) and *nemo debet bis vexari pro una et eadem causa* (“no one should be proceeded against twice for the same cause”) (ILA, *Interim Report*, p. 3; ANDREWS, pp. 941 *et seq.*; HANDLEY, para. 1.10; VON MOSCHZISKER, p. 299).

²⁹ WRIGHT, p. 721 with reference to *National Treasury Employees Union v I.R.S.*, 765 F.2d 1174, 1176 (D.C. Cir. 1985).

³⁰ HARON, pp. 543 *et seq.*

³¹ HANDLEY, para. 1.14; HASCHER, p. 17. According to Lord Goff “*res judicata* is founded upon the public interest in the finality of litigation rather than the achievement of justice as between individual litigants” (*The Indian Grace* [1993] AC 410, 415).

³² HARON, p. 543.

beyond the above. The following two chapters will reveal the differences that exist between legal systems with regard to the *res judicata* doctrine. Chapter one will compare the *res judicata* doctrine in different domestic laws. Chapter two will then examine how the *res judicata* doctrine is applied in international law.

CHAPTER 1

The Doctrine of *Res Judicata* in Domestic Laws

32. It has been said that “[t]oday, the *res judicata* doctrines of most Western societies are congruent”³³. However, while it is certainly true that most domestic *res judicata* rules prevent the same claimant from bringing identical claims against the exact same respondent in successive proceedings³⁴, beyond this point there are important differences and these differences also exist among domestic laws of Western societies.

33. This chapter will analyse and compare the *res judicata* doctrine as applied in common and civil law countries, the differences among domestic laws regarding *res judicata* being particularly marked between common law and civil law countries³⁵. However, the differences among domestic *res judicata* laws are by no means limited to the common law/civil law divide; they exist amongst civil law countries, as well as amongst common law countries.

34. One aim of this chapter is to introduce different concepts of the *res judicata* doctrine and to convey a deeper understanding of the doctrine in different domestic laws. Another aim is to show that there currently is no uniform doctrine of *res judicata* among domestic laws.

³³ BAGNER, p. 33.

³⁴ ILA, *Interim Report*, p. 3.

³⁵ BREKOULAKIS, p. 182.

1. COMMON LAW

35. The doctrine of *res judicata* is well established in common law jurisdictions. The following analysis will examine the *res judicata* doctrine first under English law (1.1.) and then under US law (1.2).

1.1. **England**

36. In England a decision that qualifies as a *res judicata* may give rise to a plea of cause of action estoppel, issue estoppel, former recovery, or abuse of process. While each of these pleas has its own conditions regarding the subject matter that can be precluded, they all presuppose a decision that qualifies as *res judicata*³⁶. In addition, the preclusive effects of a *res judicata* can only be relied upon successfully if the parties or privies in the subsequent proceedings are the same as in the proceedings which gave rise to the *res judicata*³⁷.

37. The following analysis will introduce each of the constituent elements of a *res judicata* (1.1.1.), the effects to which a *res judicata* may give rise (1.1.2.), and the requirement of party identity (1.1.3.).

1.1.1. **Constituent elements of a *res judicata***

38. To qualify as a *res judicata* a decision must be judicial in character and have been pronounced by a judicial tribunal with jurisdiction over the parties and the subject matter. In addition, the decision must be final and conclusive and on the merits³⁸.

A judicial decision

39. A judicial decision for *res judicata* purposes is a decision which determines a question of law, fact or both law and fact³⁹. This can be any judicial adjudication, including judgments, orders, decrees, sentences, bankruptcy adjudications, judicial

³⁶ BARNETT, paras 1.14 *et seq.*

³⁷ BARNETT, para. 3.01.

³⁸ HANDLEY, para. 1.01. and paras 2.01 *et seq.*; BARNETT, para. 1.18.

³⁹ BARNETT, para. 1.24.

declarations and arbitral awards⁴⁰.

A judicial tribunal

40. A judicial tribunal is a tribunal that exercises judicial functions according to the law of the country where it is situated, whether this tribunal is permanent or only vested with the temporary authority to determine a particular dispute or group of disputes. It is irrelevant whether the tribunal is a superior court, a civil or criminal court, or is even called a court or a tribunal⁴¹.

A judicial tribunal with jurisdiction over the parties and the subject matter

41. The general rule is that a judicial decision can only become *res judicata* if it was rendered by a tribunal with jurisdiction over the parties and the subject matter⁴². If the tribunal exceeds its jurisdiction, either by determining matters outside its jurisdiction or by making orders in excess of its powers, its decision, in whole or in part, cannot become a *res judicata*⁴³. However, there is a presumption in favour of the jurisdiction of superior courts, who have general jurisdiction. Their decisions are never void for lack of jurisdiction⁴⁴. By contrast, with inferior courts, who have only limited jurisdiction, the presumption is the other way⁴⁵. A judgment pronounced by an inferior court without jurisdiction is a nullity whether so declared by a court with appellate or supervisory jurisdiction or not⁴⁶. A party invoking the *res judicata* effect of a prior judgment must

⁴⁰ HANDLEY, para. 2.09.

⁴¹ HANDLEY, para. 2.02; BARNETT, para. 1.19.

⁴² BARNETT, para. 2.16.

⁴³ HANDLEY, para. 4.01.

⁴⁴ HANDLEY, paras 4.03 and 4.06 with reference to *Isaacs v Robertson* [1985] AC 97, 102-103; *Cameron v Cole* (1944) 68 CLR 571, 589, 590-91; *Strachan v Gleaner Co Ltd* [2005] 1 WLR 3204 PC, 3211-3214 (“An order of a judge without jurisdiction was obviously vulnerable but it was not wholly without effect. It had to be obeyed unless and until it was set aside. The Supreme Court of Jamaica, like the High Court in England, was a superior court of unlimited jurisdiction, namely that it had jurisdiction to determine the limits of its own jurisdiction. Whenever a judge made an order he must be taken implicitly to have decided that he had jurisdiction to make it. If he was wrong, his error could be corrected by the Court of Appeal. However, he did not exceed his jurisdiction by making the error, and a judge of a co-ordinate jurisdiction did not have the power to correct it. In the instant case, if Walker J had made an error his decision could be reversed by the Court of Appeal. However, unless and until reversed, his decision was *res judicata*”).

⁴⁵ HANDLEY, para. 4.07.

⁴⁶ HANDLEY, para. 20.07.

allege and prove that it was within the jurisdiction of the (inferior) court⁴⁷.

A final and conclusive decision

42. To operate as a *res judicata* a decision must be final and conclusive for the purposes of *res judicata*⁴⁸. This is the case when the subject matter in question was raised and argued before the tribunal such that it cannot be re-opened in that same court by further proceedings⁴⁹. A judgment generally can no longer be altered by the court that rendered it when it is perfected by formal entry. At this point it becomes *res judicata*⁵⁰. A decision that is provisional or subject to revision by the court which pronounced it is not final for *res judicata* purposes⁵¹.

A decision on the merits

43. Only a decision that was rendered “on the merits” may become *res judicata*⁵². The meaning of this has been clarified in *The Sennar (No. 2)* where Lord Diplock said:

“It is often said that the final judgment [...] must be ‘on the merits’. The moral overtones which this expression tends to conjure up may make it misleading. What it means in the context of judgments delivered by courts of justice is that the court has held that it had jurisdiction to adjudicate on an issue raised in the cause of action to which the particular set of facts gives rise, and that its judgment on that cause of action is one that cannot be varied, reopened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction”⁵³.

⁴⁷ The same applies to arbitral awards (HANDLEY, para. 4.12, quoting *Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbetriebe Registrierte GmbH* [1954] 1 QB 8, 12-13).

⁴⁸ See HANDLEY, paras 5.01 *et seq.*; ZUCKERMAN, para. 24.71.

⁴⁹ BARNETT, para. 1.30. The test of finality is more stringent in case of former recovery than in case of estoppel. In case of cause of action and issue estoppel “it is necessary that the matter should have been raised and controverted before the earlier tribunal and shall have been clearly, and finally, decided by it” (*Eastwood & Holt v Studer* (1926) 31 Com Cas 251, 256). In case of former recovery the decision must “finally declare or determine the defendant’s liability for an ascertained amount leaving nothing to be judicially determined to fix the amount recoverable and render the judgment effective and capable of execution” (HANDLEY, para. 5.02).

⁵⁰ HANDLEY, para. 5.03. According to BLACKSTONE’S, a judgment in civil proceedings takes effect from the day it is given or made (para. 4.2).

⁵¹ *Nouvion v Freeman* (1889) 15 App Cas 1, HL; *Colt Industries Inc v Sarlie (No 2)* [1996] 1 WLR 1287, CA.

⁵² HANDLEY, para. 6.01.

⁵³ *DSV Silo-und Verwaltungsgesellschaft mbH v Owners of The Sennar and 13 other ships, The Sennar (No. 2)* [1985]

44. In the same case, Lord Brandon of Oakbrook further stated:

“Looking at the matter negatively a decision on procedure alone is not a decision on the merits. Looking at the matter positively a decision on the merits is a decision which establishes certain facts proved or not in dispute, states what are the relevant principles of law applicable to such facts and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned”⁵⁴.

45. Accordingly, a decision on the merits generally is a decision that determines the parties’ substantive rights. It is a final decision that disposes of the matter, other than on purely procedural grounds⁵⁵. However, in *Desert Sun Loan Corp v Hill* the Court of Appeal held that a decision on a procedural, *i.e.* a non-substantive issue could also be rendered “on the merits” where (i) there was express submission of the procedural or jurisdictional issue to the earlier court, (ii) the specific issue had been raised before and decided by that court and (iii) caution was exercised in relation to practical considerations, such as whether the issue was or should have been fully ventilated before the earlier court. The court noted that in practice a decision on procedural and non-substantive issues will only rarely be rendered “on the merits” for *res judicata* purposes⁵⁶.

46. A decision on the issue of jurisdiction may give rise to issue estoppel⁵⁷. According to Barnett, there is however authority to suggest that dismissals for want of jurisdiction are not themselves decisions on the cause of action thus dismissed and therefore not “on the merits”⁵⁸.

1 WLR 490, 494.

⁵⁴ *Ibid.*, 499.

⁵⁵ ZUCKERMAN, para. 24.71.

⁵⁶ For examples of decisions that do not meet the “on the merits” requirement, see BARNETT, para. 2.46.

⁵⁷ *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847, 858, 863 CA; BARNETT, para. 2.46; ZUCKERMAN, para. 24.60. See also *Carter v Raghbir Absan* [2007] UKHL 51.

⁵⁸ BARNETT, para. 2.46. See also HANDLEY, para. 2.15, quoting *Upendra Nath Bose v Lall* [1940] AIR (PC) 222, 225 (“The *res judicata* here was the lack of jurisdiction [...] not the reason for that decision. A Court which declines jurisdiction cannot bind parties by its reasons for declining jurisdiction: such reasons are not decisions, and are certainly not decisions by a court of competent jurisdiction. It would indeed be strange if on a dispute as to the jurisdiction of a Court to try an issue, that Court by its reasons for holding that it had no jurisdiction, could, on the principle of *res judicata* decide and bind the parties upon the very issue it was incompetent to try”).

1.1.2. Effects of a *res judicata*

47. The effects associated with the doctrine of *res judicata* are cause of action estoppel, issue estoppel, former recovery and abuse of process.

48. The first three preclusive pleas are part of the traditional *res judicata* doctrine which requires that the subject matter determined in the earlier decision is identical to the subject matter in the subsequent proceedings. While cause of action estoppel and issue estoppel both aim to avoid contradiction between the *res judicata* and the subsequent proceedings, former recovery aims to prevent reassertion of the same cause of action⁵⁹.

49. Abuse of process is also referred to as the extended doctrine of *res judicata*. It applies only in cases where the subject matter in the subsequent proceedings has not been rendered *res judicata* by the earlier proceedings⁶⁰.

Cause of action estoppel

50. A cause of action or claim is “a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person”⁶¹. It consists of “all the facts and circumstances necessary to give rise to a right to relief”⁶². All claims which arise from the same event and rely on the same evidence make up one cause of action⁶³.

51. The term “cause of action estoppel” was coined by Diplock LJ in *Thoday v Thoday*:

“[cause of action estoppel] is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e.,

⁵⁹ HANDLEY, para. 19.01.

⁶⁰ HANDLEY, para. 26.01.

⁶¹ BARNETT, para. 4.86.

⁶² ILA, *Interim Report*, p. 7.

⁶³ ILA, *Interim Report*, p. 7.

judgment was given upon it, it is said to be merged in the judgment, or, for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam”⁶⁴.

52. Diplock LJ emphasised the aim to avoid contradiction. A party pleading cause of action estoppel alleges that the entire cause of action has already been finally and conclusively determined in earlier proceedings. The party must establish that the same claim was rendered *res judicata* by the earlier decision and that it is this *res judicata* that is contradicted in the subsequent proceedings⁶⁵.

53. For cause of action estoppel to apply all that is necessary is a final and conclusive decision on the merits of the claim rendered between the same parties or their privies⁶⁶. Where these requirements are met, the plea of cause of action estoppel provides an absolute bar to re-litigation in respect of all points decided in the earlier proceedings, unless it can be shown that the earlier decision was obtained by fraud or collusion⁶⁷.

Issue estoppel

54. The plea of issue estoppel prevents the re-litigation of a particular issue of fact or law, or of fact and law, which the prior decision necessarily established as the legal foundation for its conclusion⁶⁸.

⁶⁴ *Thoday v Thoday* [1964] P 181, 197, CA.

⁶⁵ BARNETT, para. 4.18.

⁶⁶ BARNETT, para. 1.39. See also *North West Water Ltd v Binnie & Partners* [1990] 3 All ER 547, 551.

⁶⁷ ANDREWS, para. 40.13; ZUCKERMAN, para. 24.65.

⁶⁸ HANDLEY, para. 8.01; BARNETT, para. 1.40. See also *Arnold v National Westminster Bank plc* [1991] 2 AC 93, 105; *Yukos Capital Sarl v OJSC Rosneft Oil Company* [2011] EWHC 1461 (Comm) at para. 53 (“The issues which are necessary to a decision in a particular case will depend on the matters in issue in that case. It cannot be answered in general or abstract terms. One test of whether a finding is fundamental is whether the decision could stand without that particular finding [...]. If it could not do so then it can be said to be fundamental to the decision”); *P&O Nedlloyd BV v Arab Metals Co and others* [2006] EWCA Civ 1717 at paras 23-24. For comparison, see also the decision of the High Court of Australia in *Blair v Curran* (1939) 62 CLR 464, 531-533, HCA. In this case, Dixon J said: “[a] judicial determination directly involving an issue of fact or of law disposes once and for all of the issue, so that it cannot be raised [again] between the same parties. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification for its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commenced or restrained or that rights be declared. The distinction between *res judicata* and issue estoppel is that in the first the

55. Issue estoppel extends only to issues that were actually addressed and determined, and only if the issues were necessary and fundamental to the earlier decision⁶⁹. Issues which are merely subsidiary or collateral are not covered by issue estoppel⁷⁰. Further, the issues in the subsequent proceedings must be identical to those determined in the earlier decision and that decision must qualify as a *res judicata*; i.e. it must be a final and conclusive decision on a claim⁷¹. The parties to the two proceedings must be the same or their privies⁷². However, the causes of action in the two proceedings may be entirely different⁷³.

56. Ordinarily, a particular issue will be rendered *res judicata* as part of a final

very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order. Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. In matters of fact the issue estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established. Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negatived. But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment, decree or order. In the phraseology of Coleridge J. in *R. v. Inhabitants of the Township of Hartington Middle Quarter*, the judicial determination concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue. Matters cardinal to the latter claim or contention cannot be raised if to raise them is necessarily to assert that the former decision was erroneous. In the phraseology of Lord Shaw, ‘a fact fundamental to the decision arrived at’ in the former proceedings and ‘the legal quality of the fact’ must be taken as finally and conclusively established (*Hoystead v. Commissioner of Taxation*). But matters of law or fact which are subsidiary or collateral are not covered by the estoppel. Findings, however deliberate and formal, which concern only evidentiary facts and not ultimate facts forming the very title to rights give rise to no preclusion. Decisions upon matters of law which amount to no more than steps in a process of reasoning tending to establish or support the proposition upon which the rights depend do not estop the parties if the same matters of law arise in subsequent litigation”.

⁶⁹ ZUCKERMAN, para. 24.67. On the issue of whether a determination made in a prior judgment was fundamental see also case law cited in fn 68.

⁷⁰ *Good Challenger Navegante SA v Metalexportimport SA* [2003] EWCA Civ 1668.

⁷¹ BARNETT, para. 5.03.

⁷² The core requirements for the creation of an issue estoppels were succinctly set out in Lord Brandon of Oakbrook’s judgment in *The Sennar (No. 2)* [1985] 1 WLR 490 (HL) at 499: “in order to create an [issue estoppel], three requirements have to be satisfied. The first requirement is that the judgment in the earlier action relied on as creating an estoppel must be (a) of a Court of competent jurisdiction, (b) final and conclusive and (c) on the merits. The second requirement is that the parties (or privies) in the earlier action relied on as creating an estoppel, and those in the later action in which that estoppel is raised as a bar, must be the same. The third requirement is that the issue in the later action, in which the estoppel is raised as a bar, must be the same issue as that decided by the judgment in the earlier action”. See also *Yukos Capital Sarl v OJSC Rosneft Oil Company* [2011] EWHC 1461 (Comm), paras 42 *et seq.*

⁷³ ZUCKERMAN, para. 24.48.

decision on a claim⁷⁴. In *Thoday v Thoday* Diplock LJ explained:

“There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, [...] neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was”⁷⁵.

57. There may be an exception to issue estoppel when the injustice of not allowing the matter to be re-litigated outweighs the hardship of the opponent of losing the benefit of the earlier findings⁷⁶. Normally, issue estoppel may be overcome only in two types of situations: first, where the party against whom issue estoppel is pleaded shows that further material, relevant to the correct determination of an issue in the earlier proceedings, has become available to it and that it could not by reasonable diligence have adduced this material during the earlier proceedings. Second, where there has been a material change in the law since the findings were made⁷⁷.

Former recovery

58. Former recovery prevents a party in whose favour a final decision has been rendered from recovering a second decision against the same party based on the same cause of action⁷⁸. The party's claim or cause of action is extinguished by the first

⁷⁴ BARNETT, para. 5.04.

⁷⁵ *Thoday v Thoday* [1964] P 181, 197, CA.

⁷⁶ See *Yukos Capital Sarl v OJSC Rosneft Oil Company* [2011] EWHC 1461 (Comm), paras 59 *et seq.*

⁷⁷ ZUCKERMAN, para. 24.69. See also ILA, *Interim Report*, p. 8; BLACKSTONE'S, para. 4.4; *McIlkenny v Chief Constable of the West Midlands* [1980] 1 QB 283, CA; *Arnold v National Westminster Bank plc* [1991] 2 AC 93, [1991] 3 All ER 41, HL.

⁷⁸ HANDLEY, para. 19.01.

decision⁷⁹.

59. Like cause of action estoppel, former recovery presupposes a final and conclusive decision on a cause of action. The cause of action and the parties must be the same in both proceedings. However, former recovery operates only against the party in whose favour relief has been granted by the earlier decision. The successful party is precluded from reasserting the same claim against the same party in order to obtain further relief. By contrast, cause of action estoppel can be raised by or against any party to the prior proceedings, as it does not merely seek to prevent reassertion; it has the broader aim of avoiding contradiction of a cause of action that is *res judicata*⁸⁰.

Abuse of process: the rule in Henderson v Henderson

60. Where the subject matter in controversy has not already been rendered *res judicata* by an earlier decision a party may still prevent litigation of that matter by pleading abuse of process.

61. For abuse of process to be successful it is necessary that the subject matter could and should have been rendered *res judicata* by the earlier decision had the parties, with all due diligence, brought the matter before the prior tribunal⁸¹. The abuse of process doctrine is based on the general rule of public policy according to which a claimant must bring forward his entire case in one action⁸². There must also be an additional element, such as dishonesty or unjust harassment⁸³.

62. The application of the abuse of process doctrine by the courts is discretionary. The court has to balance the conflicting interests of the parties and consider the wider public interest. The party pleading abuse of process has to convince the court that it would be just to deny the opponent the opportunity to raise a subject matter that has

⁷⁹ HANDLEY, para. 19.02; BARNETT, para. 1.37.

⁸⁰ BARNETT, paras 1.41 *et seq.*; HANDLEY, para. 19.01 (in case of cause of action estoppel “that which must not be controverted is a proposition of law or finding of fact. In cases of former recovery what is not allowed is a second proceeding for the same relief”).

⁸¹ BARNETT, para. 1.46; ZUCKERMAN, para. 24.78.

⁸² ZUCKERMAN, para. 24.80; *De Crittenden v Bayliss* [2005] EWCA Civ 1425.

⁸³ See BLACKSTONE’S, para. 33.14.

not been determined by a prior decision⁸⁴.

63. Abuse of process is also known as the rule in *Henderson v Henderson*. In this case, Vice-Chancellor Wigram said:

“[...] where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special-case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time”⁸⁵.

64. In *Barrow v Bankside Members Agency Ltd and another* Sir Thomas Bingham MR explained the rule in the following terms:

“It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed”⁸⁶.

65. In *Henderson v Henderson* the rule was expressed in terms of *res judicata*. Today, the rule is commonly referred to as the “extended” doctrine of *res judicata*. It rests upon the same considerations as the doctrine of *res judicata*, namely that there should be an end to litigation and that a party should not be vexed twice in the same matter. However, since the rule only applies in cases where the subject matter in question has not already been rendered *res judicata* the reference to the *res judicata* doctrine is

⁸⁴ ZUCKERMAN, para. 24.59. Courts should remember the words of Lowry CJ: “The entire corpus of authority of issue estoppel is based on the theory that it is not an abuse of process to relitigate a point where any of the [...] requirements of the doctrine is missing” (*Shaw v Sloan* [1982] NI 393, 397).

⁸⁵ *Henderson v Henderson* (1843) 3 Hare 100, 115.

⁸⁶ *Barrow v Bankside Members Agency Ltd and another* [1996] 1 WLR 257, 260, CA.

avoided⁸⁷. Since the decision of the House of Lords in *Johnson v Gore Wood & Co*⁸⁸ the rule is associated with the doctrine of abuse of process⁸⁹ rather than with the doctrine of *res judicata*.

1.1.3. The same parties

66. The rules that settle who can take advantage of, or be bound by, a *res judicata* depend on whether the decision relied on is a “judgment *in personam*” or a “judgment *in rem*”⁹⁰. Judgments *in rem* determine the status of a person or thing and operate against the whole world. By contrast, judgments *in personam* determine the rights and liabilities as between the parties to the proceedings⁹¹. The following analysis only concerns judgments *in personam*.

67. The *res judicata* effects of a judgment are limited by the doctrines of privity and mutuality. According to the doctrine of privity only the parties or privies to the proceedings which gave rise to the *res judicata* can benefit or be bound by it in subsequent proceedings. The parties must be identical in all proceedings or privies to the parties in the first proceedings. No third person can rely on the effects of a *res judicata* or be bound by it⁹². The doctrine of mutuality applies in cases of cause of action or issue estoppel and requires that the estoppel is mutual. This means that

“each party in the *subsequent* proceedings must have been party or privy to the earlier proceedings, and must claim or defend in the subsequent proceedings in the same right as they, or those to whom they are privy, claimed or defended in the earlier”⁹³.

⁸⁷ BARNETT, para. 1.46 and paras 6.18 *et seq.*; ANDREWS, para. 40.34 and para. 40.60.

⁸⁸ *Johnson v Gore Wood & Co* [2002] 2 AC 1. *Johnson v Gore Wood & Co* approved *Bradford & Bingley Building Society v Seddon* [1999] 1 WLR 1482, CA. See also *Sweetman v Nathan* [2003] EWCA Civ 1115.

⁸⁹ According to the doctrine of abuse of process “subsequent proceedings should be precluded if it is necessary for a court to prevent a misuse of its procedure in the face of unfairness to another party, or to avoid the risk that the administration of justice might be brought into disrepute among right-thinking people. [It] rests upon the inherent power of the court to prevent misuse of its procedure even though a party’s conduct may not be inconsistent with the literal application of procedural rules [...]. Its application is wholly discretionary” (ILA, *Interim Report* p. 8).

⁹⁰ On the new category of judgments in bankruptcy and insolvency proceedings, see HANDLEY, paras 9.02 *et seq.*

⁹¹ BARNETT, para. 3.02.

⁹² BARNETT, para. 3.04.

⁹³ BARNETT, para. 3.05.

68. While the doctrine of mutuality has been partially rejected in the United States⁹⁴ it remains the rule in England⁹⁵.

Parties

69. The parties to the proceedings are the individuals or entities named on the record of the proceedings as litigants⁹⁶. The parties in the subsequent proceedings must claim or defend in the same capacity as in the prior proceedings. A party who litigates in a different capacity is in law a separate person and a prior decision does not bind him personally or in another capacity⁹⁷.

70. In some cases individuals or entities not named as parties on the record of the proceedings may still be deemed parties for *res judicata* purposes. Deemed parties are different to privies. While deemed parties are parties in their own right, privies acquire privity through the right, title or interest of another party⁹⁸.

71. Deemed parties include those who intervene and take active part in the proceedings⁹⁹; third and subsequent parties who become parties to the proceedings between the prior parties¹⁰⁰; and those who insist on being added as a party and obtain an order to this effect¹⁰¹. Furthermore, a court can look behind the record to identify the “real” party¹⁰². Accordingly, persons who direct another person to pursue litigation on their behalf may also be deemed parties.

Privies

72. A privy is a person or entity “upon whom all the rights and obligations of any

⁹⁴ See *infra*, paras 111 *et seq.*

⁹⁵ *Hunter v Chief Constable of the West Midlands* [1982] AC 529, HL; cf *McIlkenny v Chief Constable of the West Midlands* [1980] 1 QB 283, CA. See also HANDLEY, para. 9.05.

⁹⁶ IIA, *Interim Report*, p. 9.

⁹⁷ HANDLEY, para. 9.22; BARNETT, para. 3.10.

⁹⁸ BARNETT, para. 3.18.

⁹⁹ By contrast, those who have an interest in the dispute and a right to intervene, but who stand by and allow the litigation to be conducted by others, do not become parties. A person must actively intervene for the “same party” requirement to be met (See HANDLEY, para. 9.12).

¹⁰⁰ See HANDLEY, para. 9.11.

¹⁰¹ BARNETT, para. 3.17.

¹⁰² HANDLEY, para. 9.14. For more details on parties to decisions *in personam* see HANDLEY, paras 9.01 *et seq.*

legal entity devolve, including the right to the benefit of, or the obligation to be bound by, a *res judicata*¹⁰³.

73. There are three categories of privity: privity in blood, title or interest¹⁰⁴. Privies in blood include ancestors and heirs. Privies in title include any person who succeeds to the rights or liabilities of a party upon death or insolvency¹⁰⁵. A privity in interest has some kind of interest, legal or beneficial, in the previous litigation or its subject matter¹⁰⁶. The requirements for privity in interest have been succinctly expressed in the following terms:

“There must be an examination of the parties’ interests, as well as the existence of a sufficient degree of identification between the parties, before it is just to hold that a decision in respect of one party should be binding in proceedings to which another is party. Moreover, the interest in the previous litigation or its subject matter must be legal or beneficial: a mere curiosity or concern in the litigation or some interest in the outcome is not sufficient”¹⁰⁷.

74. Privity in interest has been held to exist between a trustee and a beneficiary where the trustee sues for the benefit of the beneficiary¹⁰⁸. There also is privity in interest if a person acts on a decision in litigation and claims under the party entitled to it¹⁰⁹. By contrast, no privity in interest exists between a licensee and a licensor of

¹⁰³ BARNETT, para. 3.20.

¹⁰⁴ See, generally, HANDLEY, paras 9.38 *et seq.*

¹⁰⁵ BARNETT, para. 3.21.

¹⁰⁶ On the notion of privity in interest, see, generally, HANDLEY, paras 9.43 *et seq.*

¹⁰⁷ BARNETT, para. 3.22. See also *Johnson v Gore Wood & Co* [2002] 2 AC 1, 32 where Bingham LJ cited a statement by Megarry J in *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510, 515: “[I]t seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase ‘privity of interest’”.

¹⁰⁸ *Churchill & Sim v Goddard* [1937] 1 KB 92; *Gleeson v J Wippell & Co* [1977] 1 WLR 510; *Young v Murphy* [1996] 1 VR 279 CA, 285-87.

¹⁰⁹ BARNETT, para. 3.23.

intellectual property rights if sued in separate proceedings by a same claimant¹¹⁰ or between a company and their shareholders, even if the shareholders are controlling¹¹¹. Furthermore, persons with separate but identical interests in the same question are not privies; members of a class have their own interest and are not privies of each other¹¹².

75. Some courts have contemplated extending the category of privity of interest¹¹³. However, it has been strongly suggested that “there is no basis for extending privity of interest to include cases where the interest is merely a financial right or interest in the previous action”¹¹⁴.

1.2. United States

76. In the United States the doctrine of *res judicata* is generally similar to the doctrine in England, albeit that it varies amongst the States¹¹⁵. The following analysis will cover the doctrine in federal law and only as regards *in personam* judgments.

77. The US Supreme Court embraces the Restatement of the Law (Second) of Judgments as stating the basic federal law on *res judicata*¹¹⁶. In the Restatement (Second) the doctrine of *res judicata* covers both claim and issue preclusion¹¹⁷. Each of these concepts in turn is made up of two preclusive effects. Claim preclusion covers merger, *i.e.* the extinguishment of a claim in a judgment rendered in favour of the claimant¹¹⁸, and bar, *i.e.* the extinguishment of a claim in a judgment rendered in favour of the

¹¹⁰ *Mecklermedia Corp v DC Congress GmbH* [1998] Ch. 40.

¹¹¹ *Baratok Ltd v Epiette Ltd* [1998] 1 BCLC 283, CA.

¹¹² HANDLEY, para. 9.49.

¹¹³ See, *e.g.*, *House of Spring Gardens Ltd v Waite and others* [1991] 1 QB 241, CA. In this case, Stuart-Smith LJ invoked “justice and common sense” in order to preclude a third defendant who was not a party to the prior proceedings from alleging that the earlier decision was obtained by fraud. See also *Carl Zeiss (No 2)* [1967] 1 AC 853, HL.

¹¹⁴ BARNETT, para. 3.25 with reference to *Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd* (1993) 43 FCR 510 (Federal Court of Australia).

¹¹⁵ SHEPPARD, *The Scope and Res Judicata Effect of Arbitral Awards*, p. 270.

¹¹⁶ See, *e.g.*, *New Hampshire v Maine*, 532 US 742, 749-50 (2001); *Baker by Thomas v General Motors Corp*, 522 US 222, 234 n. 5 (1998); *Migra v Warren City School District Board Of Education et al.*, 465 US 75, 77 n. 1 (1984); *United States v Mendoza* 464 US 154, 158 n. 3 (1984). See also KLEIN/PONOROFF/BORREY, p. 844.

¹¹⁷ ALI, *Restatement (Second), Judgments*, p. 131. This terminology was adopted by the US Supreme Court in *Taylor v Sturgell*, 553 US 880, 893 (2008). It is important to note that the terminology varies. Some cases and commentators refer to claim preclusion as “res judicata” and to issue preclusion as “collateral estoppel”. On terminology, see also *Alary Corp v Sims (In re Associated Vintage Group)*, 283 B.R. 549, 554-55 (Bankr. 9th Cir. 2002).

¹¹⁸ ALI, *Restatement (Second), Judgments*, § 18.

respondent¹¹⁹. Issue preclusion encompasses both direct and collateral estoppel. In case of direct estoppel, the claim in the subsequent proceedings is the same as in the prior proceedings. By contrast, in case of collateral estoppel, the claim in the subsequent proceedings is different to the claim in the prior proceedings¹²⁰.

78. The following analysis will determine the constituent elements of a *res judicata* (1.2.1) and its effects in US federal law (1.2.2.). It will then examine the requirement of party identity, including the possibility to extend the *res judicata* doctrine to third parties (1.2.3.).

1.2.1. Constituent elements of a *res judicata*

79. The application of the *res judicata* doctrine presupposes a valid and final personal judgment¹²¹.

A valid judgment

80. A valid judgement must meet the following requirements: the parties must have been given adequate notice of the proceedings and opportunity to be heard, and the judgment must have been rendered by a court with territorial and subject matter jurisdiction¹²².

81. The notice to the parties must be adequate¹²³ and be transmitted in a way that “in ordinary circumstances is reasonably certain to convey actual notice to”¹²⁴ the persons concerned or their representative¹²⁵.

82. §§ 4 to 10 of the Restatement (Second) cover the territorial jurisdiction requirement. According to the Supreme Court’s decisions in *International Shoe Co. v*

¹¹⁹ ALI, *Restatement (Second), Judgments*, § 19.

¹²⁰ ALI, *Restatement (Second), Judgments*, p. 131. The term “collateral estoppel” is commonly used in the general meaning of “issue preclusion”. See, e.g., MARCUS/REDISH/SHERMAN, p. 948.

¹²¹ ALI, *Restatement (Second), Judgments* § 17; *Moncur v Agrigredit Acceptance Co (in re Moncur)* 328 B R 183, 187-88 (Bankr. 9th Cir. 2005).

¹²² ALI, *Restatement (Second), Judgments*, § 1.

¹²³ ALI, *Restatement (Second), Judgments*, § 2 (1)(a).

¹²⁴ ALI, *Restatement (Second), Judgments*, p. 35.

¹²⁵ ALI, *Restatement (Second), Judgments*, § 2 (1)(b) and p. 35.

*Washington*¹²⁶ and *Shaffer v Heitner*¹²⁷, it is both sufficient and necessary that there be “minimum contacts” between the state where the court is situated and the parties or the transaction. However, the observance of the territorial jurisdiction requirement may generally be waived by a party¹²⁸.

83. The subject matter jurisdiction describes the authority of a court to decide a given type of legal controversy¹²⁹. All courts in the US federal system have limited subject matter jurisdiction. It exists only where it is expressly or impliedly consigned to them¹³⁰. An objection to subject matter jurisdiction generally may be taken at any time during an action, even on appeal, and may even be taken after the judgment has become final. Traditionally, a judgment rendered without subject matter jurisdiction was always “void” and could never become *res judicata*¹³¹. Today it is only in exceptional circumstances that a lack of subject matter jurisdiction can be invoked after the judgment was rendered for the purpose of holding the judgment to be a nullity¹³².

A final judgment

84. According to § 13 of the Restatement (Second), “[t]he rules of *res judicata* are applicable only when a final judgment is rendered”. The Restatement (Second) further describes the requirement in the following terms:

“[...] when *res judicata* is in question a judgment will ordinarily be considered final in respect to a claim (or a separable part of a claim [...]) if it is not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court, short of any steps by way of execution or enforcement that may be consequent upon the particular kind of adjudication. Finality will be lacking if an issue of law or fact essential to the adjudication of the claim has been reserved for future determination, or if the court has decided that the plaintiff should have relief against the defendant of the claim but the amount of the damages, or the form or scope of other

¹²⁶ *International Shoe Co. v Washington*, 326 US 310, 316 (1945).

¹²⁷ *Shaffer v Heitner*, 433 US 186 (1977); ALI, *Restatement (Second), Judgments*, p. 57.

¹²⁸ See ALI, *Restatement (Second), Judgments*, pp. 31 *et seq.*

¹²⁹ See ALI, *Restatement (Second), Judgments*, §§ 11 and 12.

¹³⁰ ALI, *Restatement (Second), Judgments*, p. 108.

¹³¹ ALI, *Restatement (Second), Judgments*, pp. 116 *et seq.*

¹³² ALI, *Restatement (Second), Judgments*, p. 32 and pp. 120 *et seq.*

relief, remains to be determined”¹³³.

85. While the finality test is applied strictly in case of claim preclusion, it is relaxed in case of issue preclusion requiring the prior adjudication only to be “sufficiently firm to be accorded conclusive effect”¹³⁴. The issue must have been adequately deliberated and the decision on the issue must not be tentative. That the parties were fully heard on the issue, that the court supported its decision with a reasoned opinion and that the decision was subject to appeal or was in fact reviewed on appeal are factors supporting finality for purposes of issue estoppel. The question is whether the decision on a particular issue is procedurally definite and not whether the court had doubts in reaching its decision¹³⁵.

86. For purposes of *res judicata* a judgment becomes final on the day it is rendered¹³⁶.

A judgment on the merits?

87. Under the first Restatement of the Law of Judgments only a final judgment on the merits could give rise to claim preclusion¹³⁷. The Restatement (Second) no longer uses the terminology “on the merits” because of its misleading connotation¹³⁸.

88. The modern rule of claim preclusion requires (1) that the claims in both sets of proceedings are based on the same transaction; (2) that the procedure in the prior proceedings (including the possibility of appeal) did not exclude an opportunity to present the matter advanced in the subsequent proceedings; and (3) that the judgment was not a dismissal without prejudice¹³⁹ or was not based on some other ground that allows the bringing of a second proceeding. What is essential is not that the first

¹³³ ALI, *Restatement (Second), Judgments*, pp. 132 *et seq.* According to the US Supreme Court, a final judgment is one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment” (*Catlin v United States*, 324 US 229, 233 (1949)).

¹³⁴ ALI, *Restatement (Second), Judgments*, § 13.

¹³⁵ ALI, *Restatement (Second), Judgments*, p. 136; WRIGHT, p. 725.

¹³⁶ ALI, *Restatement (Second), Judgments*, § 14. See also *Coover v Saucon Valley School District et al.*, 955 F. Supp. 392, 412 (E.D. Pa. 1997); *Smith v Securities & Exch. Comm.*, 129 F.3d 356, 362 n.7 (6th Cir. 1997) (“The fact that Smith has an appeal of that judgment pending does not deprive the judgment of *res judicata* effect”).

¹³⁷ ALI, *Restatement, Judgments*, §§ 41 and 45.

¹³⁸ ALI, *Restatement (Second), Judgments*, p. 161.

¹³⁹ In federal courts a dismissal requested by the claimant is ordinarily without prejudice. An involuntary dismissal usually operates as a judgment on the merits. In both cases, the court may order otherwise (see JAMES Jr./HAZARD Jr./LEUBSDORF, § 11.16, p. 703).

judgment determined the merits of the claim after proceedings on the substantive issues, but that the parties to the prior proceedings had a fair opportunity to get to the proceedings on the merits¹⁴⁰.

89. Decisions on the issue of territorial¹⁴¹ and subject matter jurisdiction¹⁴² may become *res judicata*.

1.2.2. Effects of a *res judicata*

90. A party to a prior judgment may raise the pleas of claim preclusion and issue preclusion¹⁴³. Unlike English law, US law does not distinguish a separate plea of abuse of process. However, as will be shown, claim preclusion appears to achieve similar results, encompassing a certain degree of abuse of process.

Claim preclusion

91. Claim preclusion prevents a party from re-litigating a claim or cause of action that was, or could have been, determined in prior proceedings by a court of competent jurisdiction in a final and valid judgment¹⁴⁴.

¹⁴⁰ JAMES Jr./HAZARD Jr./LEUBSDORF, § 11.16, p. 702; WRIGHT, p. 723. See also *Semtek Int'l Inc. v Lockheed Martin Corp.* 531 US 497 (2001) for an interpretation of the meaning of “operates as an adjudication upon the merits” in Rule 41(b) Federal Rule of Civil Procedure.

¹⁴¹ ALI, *Restatement (Second), Judgments*, §10 (2) and pp. 103 *et seq.*

¹⁴² ALI, *Restatement (Second), Judgments*, §12 and pp. 116 *et seq.*

¹⁴³ Claim and issue preclusion are affirmative defences under Rule 8 (c) Federal Rules of Civil Procedure. Both pleas must therefore be raised or risk being waived (*Taylor v Sturgell*, 553 US 880, 908 (2008)). Some courts will however raise *res judicata* on their own motion. See, *e.g.*, *Lacroix et al v Marshall County, Mississippi*, 2011 US App LEXIS 2250*13 (“Generally, *res judicata* is an affirmative defense that must be pleaded, not raised *sua sponte*. There are two exceptions to this general rule. The first, which applies to ‘actions [that] were brought before the same court,’ does not apply here. ‘The other exception involves the situation in which all relevant data and legal records are before the court and the demands of comity, continuity in the law, and essential justice mandate judicial invocation of the principles of *res judicata*’); *Scherer v Equitable Life Assurance Soc’y*, 347 F.3d 394, 398 n.4 (2d Cir. 2003) (“[A] court is free to raise [the *res judicata*] defense *sua sponte*, even if the parties have seemingly waived it”); *O’Connor v Pierson*, 568 F.3d 64, 68 n.2 (2d Cir. 2009) (“[A] court has authority to invoke the doctrine of *res judicata* on its own initiative, even when the defense has been waived”); *Salabuddin v Jones*, 992 F.2d 447, 449 (2d Cir. 1993) (“The failure of a defendant to raise *res judicata* in answer does not deprive a court of the power to dismiss a claim on that ground”).

¹⁴⁴ See, *e.g.*, *Commissioner v Sunnen*, 333 US 591, 597 (1948) (“The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound, not only as to every matter which was offered and received to sustain the claim or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose”). See also *Allen v McCurry*, 449 US 90, 94 (1980); *Kremer v Chemical*

92. Since the adoption of the Restatement (Second), the concept of “claim” is defined broadly in terms of “transaction”¹⁴⁵. According to § 24 (1) a “claim” for purposes of claim preclusion comprises all rights of the claimant to remedies against the respondent with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose¹⁴⁶.

93. There is no precise definition of the term “transaction”. According to the Restatement (Second) the term must be interpreted pragmatically, giving attention to the facts of the case. The formulation defines a process rather than an absolute concept¹⁴⁷:

“What factual grouping constitutes a ‘transaction’, and what groupings constitute a ‘series’, are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage”¹⁴⁸.

94. The rule in § 24 aims to avoid the “splitting” of a single claim. A claim is understood as a logical unit or entity of facts which all describe a certain transaction and this unit may not be split. The claimant is precluded from presenting matters related to

Construction Corp, 456 US 461, 467 n.6 (1982). Furthermore, see *Wolf v Gruntal & Co., Inc.*, 45 F.3d 524, 527 (1st Cir. 1995) (“Unlike collateral estoppel (issue preclusion), *res judicata* (claim preclusion) normally bars (i) relitigation of claims actually asserted in a tribunal of competent jurisdiction, [...] and (ii) litigation of claims that arose from the same set of operative facts and could have been raised in the prior proceeding”); *Brody v Hankin*, 299 F. Supp. 2d 454, 458 (E.D. Pa. 2004) (“*Res judicata* applies to all claims actually brought or which could have been brought in a prior action regardless of whether they were asserted or determined in the prior proceeding”). Claim preclusion has been described as a “use it or lose it” rule (*McM Stone Co. v Hornberger*, 2009 U.S. Dist. LEXIS 91577*28).

¹⁴⁵ KLEIN/PONOROFF/BORREY, p. 848.

¹⁴⁶ The Ninth Circuit test to determine a “claim” for purposes of the merger and bar doctrines is: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same rights; and (4) whether the two suits arise out of the same transactional nucleus of facts. The test cannot be applied mechanically and no one criterion is dispositive. However, the “most important” criterion is the “transactional nucleus of facts”. This requires the pragmatic case-by-case analysis that is central to Restatement (Second), Judgements § 24. See *Alary Corp v Sims (In re Associated Vintage Group)*, 283 B.R. 549, 557-58 (Bankr. 9th Cir. 2002), with reference to *Harris v Jacobs*, 621 F.2d 341, 343 (9th Cir. 1980); *Costantini v Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982); *Robertson v Isomedix, Inc. (In re Int’l Nutronics)*, 28 F.3d 965, 969 (9th Cir. 1994).

¹⁴⁷ WRIGHT, p. 724.

¹⁴⁸ ALI, *Restatement (Second), Judgments*, § 24 (2). See also *Alary Corp v Sims (In re Associated Vintage Group)*, 283 B.R. 549, 557-58 (Bankr. 9th Cir. 2002).

the same claim or transaction in subsequent proceedings, even though these matters were not raised and determined in the prior proceedings¹⁴⁹. It is in this respect that claim preclusion resembles the English rule in *Henderson v Henderson*.

Issue preclusion

95. Issue preclusion prevents the re-litigation of an issue of fact or law. It may be invoked whether or not the claim in the subsequent proceedings is identical to the claim in the prior proceedings¹⁵⁰. Likewise, it may be invoked by persons who were not parties to the prior proceedings¹⁵¹.

96. Issue preclusion does not rule out inquiry into matters that could have been but actually were not raised and determined in prior proceedings. It bars the re-litigation only of those issues that were in fact raised and determined in prior proceedings¹⁵².

97. In addition, the re-litigation of an issue of fact or law is only precluded if the determination of that issue was essential to the prior judgment. According to the Restatement (Second) the appropriate question is whether the issue was recognised by the parties and the court as necessary to the first judgment¹⁵³.

98. There are several exceptions to the general rule of issue preclusion. They regard the quality and circumstances of both proceedings¹⁵⁴ and include the inability of one party to appeal the first judgment, changes in the legal context, differences in the quality or extensiveness of the procedures followed in the two courts, differences in burdens of proof, and a lack of an adequate opportunity or incentive to obtain a full and fair adjudication in the prior proceedings¹⁵⁵.

1.2.3. The same parties

99. While the general rule is that only parties can benefit from or be bound by a *res*

¹⁴⁹ KLEIN/PONOROFF/BORREY, p. 851.

¹⁵⁰ ALI, *Restatement (Second), Judgments*, § 27.

¹⁵¹ See *infra*, paras 111 *et seq.*

¹⁵² ALI, *Restatement (Second), Judgments*, p. 256; JAMES Jr./HAZARD Jr./LEUBSDORF, § 11.17, p. 703; KLEIN/PONOROFF/BORREY, p. 842. See also *Cromwell v County of Sac*, 94 US 351, 352 (1876).

¹⁵³ ALI, *Restatement (Second), Judgments*, p. 261.

¹⁵⁴ ILA, *Interim Report*, p. 12.

¹⁵⁵ See ALI, *Restatement (Second), Judgments*, § 28.

*judicata*¹⁵⁶, in several situations the doctrine of *res judicata* may also apply to “privies”, *i.e.* persons who were not parties to the proceedings giving rise to the *res judicata*. The terms “privy” or “privity” are ambiguous in US law as they have been variously defined. It is for this reason that the Restatement (Second) avoids using them¹⁵⁷. They are, nonetheless, widely used in case law and by commentators.

100. The following analysis will determine which persons may be bound by or benefit from a judgment in US law. Since the term “privy” is used in US law, it is useful to clarify this notion. For reasons of clarity, after introducing the notions of parties and privies, this analysis will set out the situations in which, under the Restatement (Second), non-parties may be bound by a *res judicata*. Finally, the doctrine of mutuality as applied in US law will be examined.

Parties

101. According to § 34 (1) Restatement (Second) “[a] person who is named as a party to an action and subjected to the jurisdiction of the court is a party to the action”. Accordingly, parties are those who are named parties and who appear or are validly served with process in the proceedings, as well as those who intervene¹⁵⁸.

102. For the doctrine of *res judicata* to apply a party must claim or defend in the same legal capacity in both proceedings¹⁵⁹. In addition, the *res judicata* doctrine applies only to determinations reached between parties who stand in an adversarial relation to each other. A *res judicata* generally does not bind co-claimants or co-defendants as against each other¹⁶⁰.

103. Sometimes the real parties in interest are not those whose names appear as litigants on the record of the proceedings. The persons denominated as parties are merely nominal parties. They are usually not bound by the judgment, because their

¹⁵⁶ ALI, *Restatement (Second), Judgments*, § 34 (3); WRIGHT, p. 726.

¹⁵⁷ ALI, *Restatement (Second), Judgments*, pp. 13 *et seq.*

¹⁵⁸ JAMES Jr./HAZARD Jr./LEUBSDORF, § 11.7, p. 681.

¹⁵⁹ ALI, *Restatement (Second), Judgments*, § 36.

¹⁶⁰ JAMES Jr./HAZARD Jr./LEUBSDORF, § 11.7, p. 683. By contrast, in England *res judicata* may operate between defendants (see HANDLEY, paras 9.08 *et seq.*).

names are essentially “irrelevant decoration”¹⁶¹. However, a nominal party may be bound by a *res judicata* if he permitted his name to be used and if this led the opposing party to reasonably believe that the nominal party was, in fact, the real party in interest¹⁶².

104. Where the named party is merely a nominal party another person is controlling the proceedings. As will be seen below, such a person who controls or substantially participates in the control of the proceedings is treated as a party¹⁶³. This rule applies only to issue preclusion (not to claim preclusion) because the controlling person is not a party and, therefore, by definition asserts or defends a claim other than one he himself may have¹⁶⁴.

Privies

105. The term “privity” expresses the general idea that persons who are not parties to proceedings, but who are connected with the proceedings in their interests, may be bound by or benefit from a judgment as if they were parties. Under the first Restatement of Judgments the word “privity” included non-parties (1) who control the proceedings; (2) whose interests are represented by a party to the proceedings; and (3) successors in interest to those having derivative claims¹⁶⁵.

106. In modern case law the term “privity” has an extremely flexible meaning¹⁶⁶. A person is considered “in privity” with a party if the relation between them is such that

¹⁶¹ JAMES Jr./HAZARD Jr./LEUBSDORF, § 11.7, p. 682.

¹⁶² ALI, *Restatement (Second), Judgments*, p. 371.

¹⁶³ ALI, *Restatement (Second), Judgments*, § 39 and p. 382. See also *Montana v United States*, 440 US 147 (1979); *Souffront v La Compagnie Des Sucrieries de Porto Rico*, 217 US 475 (1910). A person controls proceedings if he has an effective choice as to the legal theories and proofs to be advanced on behalf of the party. He must also have control over the opportunity to appeal the judgment. It is not sufficient to merely help finance the proceedings, to give advice or to appear as *amicus curiae* (ALI, *Restatement (Second), Judgments*, p. 384).

¹⁶⁴ ALI, *Restatement (Second), Judgments*, pp. 383 *et seq.*

¹⁶⁵ ALI, *Restatement, Judgments*, p. 389.

¹⁶⁶ *Headwaters Inc, Forest Conservation Council v US Forest Service*, 382 F.3d 1025, 1030 (9th Cir. 2004); *Taboe-Sierra Pres. Council Inc.*, 322 F.3d 1064, 1081-82 (9th Cir. 2003); *Akbenaten v Najee, LLC*, 544 F. Supp. 2d 320, 328 (S.D.N.Y. 2008) (“The doctrine of privity [...] is to be applied with flexibility. [...] [T]here is no bright line rule as to whether privity exists for *res judicata* purposes. Rather, a finding of privity [...] depends on whether, under the circumstances, the interests of the [defendant] were adequately represented [in the earlier action]” (citing *Amalgamated Sugar Co. v NL Indus., Inc.*, 825 F.2d 634, 640 (2^d Cir. 1987))).

the judgment involving the party may justly be conclusive on the non-party¹⁶⁷. Federal courts have deemed several relationships sufficiently close to justify a finding of “privity”:

“First, a non-party who has succeeded to a party’s interest in property is bound by any prior judgment against the party. Second, a non-party who controlled the original suit will be bound by the resulting judgment. Third, federal courts will bind a non-party whose interests were represented adequately by a party in the original suit. In addition, ‘privity’ has been found where there is a ‘substantial identity’ between the party and nonparty, where the nonparty ‘had a significant interest and participated in the prior action,’ and where the interests of the nonparty and party are ‘so closely aligned as to be virtually representative.’ Finally, a relationship of privity can be said to exist when there is an ‘express or implied legal relationship by which parties to the first suit are accountable to non-parties who file a subsequent suit with identical issues’”¹⁶⁸.

Non-parties affected by a res judicata pursuant to the Restatement (Second)

107. The Restatement (Second) gives three categories of situations in which persons who were not parties to the prior proceedings may be affected by the *res judicata*¹⁶⁹. These situations resemble the modern, flexible notion of “privity” in US case law.

108. First, under the Restatement (Second) a non-party may be precluded as to issues determined in proceedings between others if he was involved in the proceedings in a way that justifies denying him the opportunity to re-litigate the matters determined in the judgment. This is the case where the non-party actually controlled the proceedings or substantially participated in the control of the proceedings¹⁷⁰. This is also the case where a non-party agreed (explicitly or impliedly) to be bound by issues determined in the proceedings¹⁷¹. It may concern the determination of a claim, including all potential

¹⁶⁷ JAMES Jr./HAZARD Jr./LEUBSDORF, § 11.23, p. 714. See also *Headwaters Inc, Forest Conservation Council v US Forest Service*, 382 F.3d 1025, 1030.

¹⁶⁸ *Headwaters Inc, Forest Conservation Council v US Forest Service*, 382 F.3d 1025, 1030 quoting *Taboe-Sierra Pres. Council*, 322 F.3d 1064, 1082 and *In re Schimmels*, 127 F.3d 875, 881 (9th Cir.1997).

¹⁶⁹ See also WRIGHT, p. 727. In *Taylor v Sturgell*, 553 U.S. 880, 894-96 (2008) the US Supreme Court distinguished six categories of situations where non-parties may be bound by a *res judicata*. These six categories largely correspond the three (more broadly framed) categories in the Restatement (Second).

¹⁷⁰ See *supra*, paras 104 *et seq.*

¹⁷¹ ALI, *Restatement (Second), Judgments*, § 40.

issues therein, or may be limited to issues actually litigated¹⁷².

109. The second category of situations covers non-parties who were represented by a party in prior proceedings. Such non-parties are precluded of both claims and issues determined in the proceedings¹⁷³.

110. Finally, a non-party standing in one of a variety of substantive legal relationships with a party may be bound by a judgment affecting that party. Such legal relationships also correspond to the modern US notion of “privity”. They may exist, for example, between a predecessor and a successor as owner of interests in property¹⁷⁴, between a bailee and a bailor¹⁷⁵ or between an indemnitor and an indemnitee¹⁷⁶.

The doctrine of mutuality

111. The doctrine of mutuality¹⁷⁷ has been partially rejected in US law. While mutuality is still a requirement for claim preclusion, it no longer applies in case of issue preclusion. This means that a party is precluded from re-litigating an issue in subsequent proceedings with another person, even if that person was a complete stranger to the prior proceedings¹⁷⁸.

112. US law considers that there is no reason why an issue that was raised and determined in prior proceedings should not be treated as settled as against a party or his privy, unless he lacked a full and fair opportunity to litigate the issue in the prior proceedings or there are other circumstances that justify affording him an opportunity to re-litigate the issue¹⁷⁹. However, this rule only precludes the re-litigation of issues that the party would have been precluded from re-litigating with an opposing party¹⁸⁰.

113. The rule may be applied defensively or offensively. If applied offensively, it

¹⁷² ALI, *Restatement (Second), Judgments*, p. 390.

¹⁷³ ALI, *Restatement (Second), Judgments*, §§ 41 *et seq.*

¹⁷⁴ ALI, *Restatement (Second), Judgments*, Vol. 2, §§ 43 *et seq.*

¹⁷⁵ ALI, *Restatement (Second), Judgments*, Vol. 2, § 52.

¹⁷⁶ ALI, *Restatement (Second), Judgments*, Vol. 2, §§ 57 *et seq.*

¹⁷⁷ See *supra*, para. 67.

¹⁷⁸ *Parklane Hosiery Co. v Shore*, 439 US 322, 327-28 (1979); *Cutter v Town of Durham*, 411 A.2d 1120, 1121 (N.H. 1980).

¹⁷⁹ ALI, *Restatement (Second), Judgments*, §29.

¹⁸⁰ ALI, *Restatement (Second), Judgments*, p. 292.

allows a claimant (who was not a party to the prior proceedings) in subsequent proceedings to bring a claim based on issues determined in the prior proceedings and the defendant (who was a party to the prior proceedings) will be precluded from re-litigating such issues¹⁸¹.

2. CIVIL LAW

114. The doctrine of *res judicata* is also firmly established in civil law countries. In French and Swiss law a *res judicata* gives rise only to the single plea of *res judicata*. As will be discussed below, this plea generally does not cover the common law plea of issue estoppel or issue preclusion, but applies only to claims. Likewise, there is no plea of abuse of process, though civil procedural law may subscribe to a doctrine of abuse of rights¹⁸².

115. The doctrine of *res judicata* will be examined first in French law (2.1.) and then in Swiss law (2.2.).

2.1. France

116. In France the doctrine of *res judicata* is referred to as “*autorité de chose jugée*”. It is codified in the *Nouveau Code de Procédure Civile* (NCPC) and the *Code Civil* (CC).

117. “*Autorité de chose jugée*” must be distinguished from “*force de chose jugée*”. A judgment obtains “*autorité de chose jugée*” when it is rendered. A judgment obtains “*force de chose jugée*” when no ordinary means of recourse with suspensive effect, such as appeal proceedings, can be brought against it. When a judgment is no longer subject to any rights of recourse (ordinary or extraordinary) it is traditionally said to be “*irrévocable*”¹⁸³.

118. The following analysis will determine the constituent elements (2.1.1.) and effects of a *res judicata* in French law (2.1.2.). It will then examine the requirements that must be met for the *res judicata* doctrine to apply (2.1.3.).

¹⁸¹ ILA, *Interim Report*, p. 12.

¹⁸² ILA, *Interim Report*, p. 14; KREMSLEHNER, p. 139.

¹⁸³ PERROT/FRICÉRO, para. 65 ; HÉRON/LE BARS, para. 349, fn 171.

2.1.1. Constituent elements of a *res judicata*

119. A *res judicata* is a judgment that determines a legal dispute between parties in a way that is final and conclusive. Only the dispositive part of the judgment becomes *res judicata*.

A judgment

120. A “judgment” for *res judicata* purposes may be broadly defined as a judicial decision. Any judicial adjudication, including arbitral awards, qualifies as a judgment for *res judicata* purposes. It is of no importance whether the judgment is correct; an error in the judgment (even a violation of public policy¹⁸⁴) does not prevent it from becoming *res judicata*¹⁸⁵.

A determination of a legal dispute between parties

121. The doctrine of *res judicata* applies only to what is called “*décisions contentieuses*”¹⁸⁶. The decision must determine a legal dispute between the parties. A decision rendered in the absence of a legal dispute does not become *res judicata*. For instance, this is the case when a court renders a “*décision gracieuse*”¹⁸⁷, e.g. when it is asked by a party to authorise a certain measure. Such decisions on non-contentious matters do not become *res judicata* and may be rescinded or modified if the circumstances in which they were rendered change¹⁸⁸.

A final and conclusive judgment

122. A judgment is final and conclusive when it disposes of a legal dispute in a way that puts an end to the court’s jurisdiction over the dispute¹⁸⁹. Such a judgment

¹⁸⁴ PERROT/FRICÉRO, *Mise à jour*, para. 17.

¹⁸⁵ PERROT/FRICÉRO, paras 11 *et seq.*; HENRY, paras 14 *et seq.*, p. 2088.

¹⁸⁶ See HENRY, paras 1 bis *et seq.*, pp. 2087 *et seq.*; PERROT/FRICÉRO, *Mise à jour*, para. 25.

¹⁸⁷ According to Article 25 NCPC, “[t]he judge rules upon non-contentious matters, in absence of a dispute, where an action is referred to him that the law requires, due to the nature of the matter or the capacity of the petitioner, that he must examine it”.

¹⁸⁸ PERROT/FRICÉRO, paras 25 *et seq.*; HENRY, para. 2, p. 2087. *Contra*: HÉRON/LE BARS, para. 352; BRENNER.

¹⁸⁹ See PERROT/FRICÉRO, para. 56.

becomes *res judicata* on the matter it decides from the time of its pronouncement¹⁹⁰, even though it has not been notified to the parties¹⁹¹. The fact that means of recourse may be brought against the judgment has no impact on its *res judicata* effects; while the suspensive effects of appeal proceedings suspend the judgment's enforceability, they do not suspend its *res judicata* effects¹⁹².

A judgment on the merits

123. Article 480 NCPC defines a judgment on the merits as “a judgment which decides in its operative part the whole or part of the main issue, or one which rules upon a procedural plea, a plea seeking a plea of non-admissibility or any other interlocutory application”¹⁹³. Article 480 NCPC provides that such judgments on the merits become *res judicata* with regard to the dispute they determine. It further specifies that the “main issue” is the subject matter of the dispute as determined by the respective claims of the parties¹⁹⁴.

124. Interlocutory decisions¹⁹⁵ (such as the appointment of experts), as well as interim orders¹⁹⁶ generally do not have *res judicata* effects “on the main issue”¹⁹⁷. This means that they may not be relied upon during proceedings on the merits of the dispute¹⁹⁸. However, they are binding and cannot be reconsidered by the judge who rendered them, unless new facts emerge that change the basis on which they were rendered¹⁹⁹.

¹⁹⁰ Article 480 NCPC; PERROT/FRICÉRO, *Mise à jour*, para. 1-1.

¹⁹¹ GUINCHARD/FERRAND, para. 226.

¹⁹² GUINCHARD/FERRAND, para. 226.

¹⁹³ On the notion of the decision covered by Article 480 NCPC, see HÉRON/LE BARS, para. 343; GUINCHARD/FERRAND, para. 218.

¹⁹⁴ See Article 480 NCPC which refers to Article 4 NCPC. According to Article 4 NCPC “[t]he subject-matter of the dispute is determined by the respective claims of the parties. The originating process and the defence submissions define such claims. However, the subject-matter of the dispute may be modified by the interlocutory claims where they relate to the initial claims by a sufficient link”.

¹⁹⁵ Article 482 NCPC states: “[t]he judgment which is limited in its holding to giving a direction or a provisional order shall not carry, on the main issue, the authority of *res judicata*”. See also BRENNER.

¹⁹⁶ Article 488 NCPC states: “A summary procedure order will not become, on the main issue, *res judicata*. It may be modified or withdrawn by way of summary procedure only in the event of new supervening circumstances”.

¹⁹⁷ ILA, *Interim Report*, p. 14.

¹⁹⁸ PERROT/FRICÉRO, para. 73.

¹⁹⁹ HANOTIAU, *Complex Arbitrations*, para. 531. See also GUINCHARD/FERRAND, para. 218.

125. Sometimes a provisional decision contains in its dispositif a final determination of parts of “the main issue” in dispute²⁰⁰. Such decisions are called “*jugements mixtes*”. The part of the dispositif that contains the determination of the main issue is final and conclusive for purposes of *res judicata*. However, the part of the dispositif that is provisional does not become *res judicata*, but has only the provisional authority given to provisional decisions²⁰¹.

A judicial tribunal with jurisdiction over the parties and the subject matter?

126. It is generally considered that a judgment may become *res judicata* even if it was rendered by a tribunal lacking jurisdiction; the tribunal creates its own jurisdiction²⁰². What this means is that a party contesting the jurisdiction of the tribunal must raise the lack of jurisdiction *in limine litis*; it is not considered *ex officio*²⁰³. If the party does not challenge the judgment rendered despite the lack of jurisdiction in appeal proceedings, the judgment obtains “*force de chose jugée*”. The lack of jurisdiction will be covered and the parties will have to comply with the judgment²⁰⁴.

The scope of res judicata

127. The *res judicata* effect of a judgment is limited to its operative part, *i.e.* the *dispositif*²⁰⁵. The reasons underlying the judgment generally do not have *res judicata* effects.

128. The *dispositif* of a judgment contains the court’s decision on the matters in dispute²⁰⁶. The *dispositif* becomes *res judicata* only as regards matters which were distinctly raised and determined in adversarial proceedings. No *res judicata* effect attaches to

²⁰⁰ According to Article 544 (1) NCPC : “Judgments that decide, in their operative part, a part of the main issue and give a preparatory inquiry or interim measure may immediately be appealed against in the same way as judgments that rule upon the whole of the main issue”.

²⁰¹ GUINCHARD/FERRAND, para. 218; HENRY, para. 10, p. 2088.

²⁰² PERROT/ FRICÉRO, para. 18; GUINCHARD/FERRAND, para. 226; HÉRON/LE BARS, para. 342; HABSCHIED, *L'autorité de la chose jugée en droit comparé*, p. 186.

²⁰³ Article 74 NCPC.

²⁰⁴ HÉRON/LE BARS, para. 342; GUINCHARD/FERRAND, para. 226.

²⁰⁵ Article 1351CC states in relevant part: “The force of *res judicata* takes place only with respect to what was the subject matter of a judgment”.

²⁰⁶ Article 455 NCPC states in relevant part: “[The judgment] pronounces the decision in the form of operative part”.

matters which were not raised during the proceedings, even though the court rendered a decision on them. Equally, no *res judicata* effect attaches to matters which were raised during the proceedings but which were not decided in the operative order by the court²⁰⁷.

129. The reasons underlying the judgment generally do not have *res judicata* effect. The reasons may be relied upon to interpret the *dispositif* and to specify the meaning and scope of the court's judgment, but they do not have *res judicata* effect.

130. A distinction has been drawn traditionally between "*motifs décisives*" and "*motifs décisifs*". The term "*motifs décisives*" describes reasons which decide parts of the dispute, but which are not contained in the *dispositif*. These "*motifs décisives*" do not have *res judicata* effects²⁰⁸. By contrast, the term "*motifs décisifs*" describes reasons which constitute the necessary foundation of the *dispositif*. In the past, case law granted *res judicata* effects to these "*motifs décisifs*". In recent years, however, a stricter approach has been followed by courts²⁰⁹ and scholars²¹⁰ granting *res judicata* effects only to the *dispositif* of a judgment, to the exclusion of all reasons, whether they are *décisives* or *décisifs*.

131. By contrast, *res judicata* effects are generally granted to implicit decisions, *i.e.* decisions on matters which a court had to determine to render the judgment expressly stated in the *dispositif*. Because these decisions are implicitly contained in the judgment's *dispositif*, they are covered by its *res judicata* effects²¹¹.

²⁰⁷ See PERROT/FRICÉRO, paras 99 *et seq.*; PERROT/FRICÉRO, *Mise à jour*, para. 100.

²⁰⁸ HÉRON/LE BARS, para. 353.

²⁰⁹ Cour de cassation, 3 February 2011, *X v Y and Z* (no. 09-71.179); Cour de cassation, 13 March 2009, *M. Antoine X v M. Claude Y*, no. 08-16.033. See also DESPRÉS, para. 55, pp. 372 *et seq.*; WEILER, p. 471, with reference to case law: Cour de cassation, 7 May 2008, *Procédures*, July 2008, No. 201; Cour de cassation, 13 July 2006, *Bull. civ.*, II, No. 208; Cour de cassation, 22 November 2005, *Bull. civ.*, I, No. 425; Cour de cassation, 31 March 2004, *Bull. civ.*, IV, No. 64.

²¹⁰ See WEILER, p. 471 with reference to further authorities. According to HÉRON/LE BARS (paras 354 *et seq.*) and GUINCHARD/FERRAND (para. 221) reasons forming the necessary foundation of the *dispositif* should have negative *res judicata* effects. However, they should not have any positive *res judicata* effect. According to HÉRON (paras 2 *et seq.*), by relying on a prior decision's reasoning to interpret its *dispositif* and to specify its meaning and scope, courts are really giving *res judicata* effects to the prior decision's reasons in practice.

²¹¹ PERROT/FRICÉRO, paras 115 *et seq.*; PERROT/FRICÉRO, *Mise à jour*, para. 115; DESPRÉS, para. 47, p. 371; HENRY, para. 22, p. 2089. However, it appears that some courts have adopted a strict position and no longer give *res judicata* effects to implicit decisions. See, *e.g.*, Cour d'appel de Paris, 18 November 2004, *S.A. Thalès Air Défense v G.I.E. Euromissile et al*, JDI, No. 2 (2005), comment by Alexis

2.1.2. Effects of a *res judicata*

132. Traditionally, a judgment that qualifies as a *res judicata* may give rise to preclusive and conclusive effects²¹². First, a judgment that is *res judicata* precludes either party from re-litigating a claim decided in the judgment's *dispositif*. This so-called negative effect of the *res judicata* doctrine is unanimously accepted in French law; it is governed by Article 1351 CC.

133. The positive *res judicata* effect is controversial in French law. It provides that the prior determination of a particular matter positively imposes itself in subsequent proceedings, even though they involve a new claim. If the court in subsequent proceedings has to decide an issue that has already been decided in a prior judgment, the court is bound by the prior determination and must implement it in its decision²¹³. The positive *res judicata* effect in France is comparable to the common law concept of issue estoppel; it is considered that the issues covered by the positive *res judicata* effect will most often be found in the reasoning of a prior decision²¹⁴.

134. The positive *res judicata* effect is rarely dealt with by courts and it is not generally accepted by legal commentators. It has been argued that the positive *res judicata* effect is nothing more than a consequence of the negative *res judicata* effect, *i.e.* the right to invoke a prior decision in subsequent proceedings²¹⁵. There currently is no provision in French law that expressly confirms the positive *res judicata* effect of judgments. By requiring a triple identity of parties, cause and object, Article 1351 CC only provides for the negative *res judicata* effect²¹⁶.

135. However, the positive *res judicata* effect seems to exist in French law²¹⁷, *e.g.* at Article 95 NCPC. According to this Article

Mourre, pp. 363 *et seq.* and p. 377.

²¹² CLAY, para. 102.

²¹³ HÉRON/LE BARS, para. 345.

²¹⁴ HÉRON/LE BARS, para. 347. It will be seen below that in Switzerland the positive *res judicata* effect is interpreted in a narrower way, covering only decisions included in the *dispositif* of a prior judgment, to the exclusion of any reasoning (see *infra*, para. 169).

²¹⁵ See CLAY, para. 102.

²¹⁶ HÉRON/LE BARS, para. 346.

²¹⁷ See HÉRON/LE BARS, para. 346.

“[w]here the judge, while deciding on the issue of jurisdiction, resolves the merits at issue on which depends the jurisdiction, his decision will become *res judicata* in relation to the merits at issue”.

136. Article 95 NCPC clearly embraces the positive *res judicata* effect. However, the Cour de cassation is opposed to a general recognition of the positive *res judicata* effect. By now refusing to afford any *res judicata* effect to the reasoning of a judgment, the Cour de cassation has created a further obstacle to the positive *res judicata* effect: issues decided in the reasoning of a judgment, even if they form the basis of the judgment’s dispositif, can no longer operate as a *res judicata* and positively impose themselves in subsequent proceedings²¹⁸.

2.1.3. Requirements for the application of the doctrine of *res judicata*

137. A judgment may give rise to negative *res judicata* effects only where the parties, cause and object are identical in both proceedings. This triple identity test is contained in Article 1351 CC which states in relevant part:

“[...] It is necessary that the thing claimed be the same; that the claim be based on the same grounds; that the claim be between the same parties and brought by them and against them in the same capacity”.

138. If only one of these three elements is not identical, the prior judgment will not have negative *res judicata* effects in subsequent proceedings²¹⁹.

139. By contrast, a judgment may have positive *res judicata* effects even where the identity between the prior and subsequent proceedings is only partial: while the parties must still be identical, the cause and object in both proceedings may be different²²⁰.

Identity of parties

140. The *res judicata* doctrine applies only if the parties are the same and act in the same legal capacity in both proceedings²²¹. Consequently, third parties are not bound by

²¹⁸ HÉRON/LE BARS, para. 346.

²¹⁹ PERROT/FRICÉRO, para. 126.

²²⁰ PERROT/FRICÉRO, para. 2; HÉRON/LE BARS, paras 345 *et seq.*

²²¹ On the requirement of “same legal capacity” see PERROT/FRICÉRO, paras 145 *et seq.*

the *res judicata* effects of a judgment²²².

141. The parties are the individuals or entities who appear in the proceedings as litigants: those who have initiated the proceedings, who have been called upon to defend themselves, or who intervened and took part in the proceedings²²³. The *res judicata* effect of a judgment does not extend to the representative of the individual or entity named as party in proceedings. By contrast, the *res judicata* effect extends to a party's "*ayant cause*", *i.e.* universal successors, such as in case of legal merger, or successors having a specific title, such as an assignee²²⁴.

142. To extend the circle of persons bound by a decision the Cour de cassation has developed the concept of "*représentation*"²²⁵. This means that persons who were validly represented in the proceedings are treated as parties and are bound by the judgment²²⁶. The concept of representation has been interpreted widely to include situations where the representation was implicit or even purely fictitious²²⁷. Representation has been admitted where a person has common interests with a party to the proceedings. This is the case, for example, for co-debtors who are jointly liable. Each co-debtor is considered to represent the interests of the other co-debtors and a decision rendered against or in favour of one of them binds or benefits the others²²⁸. The same is true for creditors who are considered to be represented by their debtors²²⁹, or a surety who is considered to be represented by the principal debtor²³⁰.

Identity of cause

143. Article 1351 CC provides that the claims in both proceedings must be based on

²²² PERROT/FRICÉRO, para. 148.

²²³ PERROT/FRICÉRO, para. 132.

²²⁴ HÉRON/LE BARS, para. 339; ILA, *Interim Report* p. 16. See also HENRY, paras 48 *et seq.*, p. 2092 ; PERROT/FRICÉRO, paras 143 *et seq.*

²²⁵ See HÉRON/LE BARS, para. 340; PERROT/FRICÉRO, para. 140.

²²⁶ PERROT/FRICÉRO, para. 136.

²²⁷ PERROT/FRICÉRO, para. 140.

²²⁸ PERROT/FRICÉRO, para. 141; HENRY, para. 50, p. 2092. See also Cour d'Appel de Paris, 10 March 2005, *S.A Sucres et Denrées v Société Multitrade Cairo*, Rev. arb., No. 2 (2006), pp. 456 *et seq.*

²²⁹ PERROT/FRICÉRO, para. 142.

²³⁰ PERROT/FRICÉRO, para. 141 (this does not seem to be the case under English law. See HANDLEY, para. 9.27).

the same grounds. In other words, the causes must be identical²³¹.

144. The “same cause” requirement has given rise to difficulties in practice, because there is no uniform definition of the term “cause”. For some the cause is the legal rule or principle on which a party’s claim is based. For others the term describes the set of facts supporting a claim, independent of the rule or principle of law invoked by the parties, the law being the prerogative of the judge. For still others the term describes both the factual and legal basis of the claim²³². According to Mayer, the cause constitutes an abstract category (“*catégorie abstraite*”) and must be determined with regard to the content of the claim. The cause thus defined extends to other facts and rules than those relied upon in the first proceedings, as long as they form part of the same category²³³.

145. While there is no mention of the term “cause” in the NCPC, it appears that under the NCPC the cause is the mere set of facts invoked by the parties in support of their claim²³⁴. Under the CC, it was considered traditionally that the term “cause” in Article 1351 refers to both the factual and legal grounds of a claim²³⁵. It is unclear how the Cour de cassation defined the cause under Article 1351 CC in the *Cesareo* case²³⁶. It has been submitted that the court determined the cause only with regard to the set of facts (“*la situation globale*”) underlying the new claim²³⁷. The court held that a claimant must invoke all possible legal grounds of his claim when bringing the first action. If the claimant fails to do so he may not rely on the “same cause” requirement and the *res judicata* doctrine may bar all subsequent proceedings with regard to a claim arising out of the same set of facts²³⁸. The Cour de cassation confirmed its decision in *Cesareo* on two

²³¹ See, generally, PERROT/FRICÉRO, paras 178 *et seq.*

²³² See PERROT/FRICÉRO, para. 165; MAYER, *Réflexions sur l'autorité négative de chose jugée*, paras 12 *et seq.*

²³³ MAYER, *Réflexions sur l'autorité négative de chose jugée*, para. 13.

²³⁴ See Articles 6 to 8 NCPC. See also PERROT/FRICÉRO, para. 166; GUINCHARD/FERRAND, para. 225.

²³⁵ PERROT/FRICÉRO, para. 166; GUINCHARD/FERRAND, para. 225.

²³⁶ Cour de cassation (assemblée plénière), 7 July 2006, *Cesareo v Cesareo* (“*Gilbert Cesareo ne pouvait être admis à contester l'identité de cause des deux demandes en invoquant un fondement juridique qu'il s'était abstenu de soulever en temps utile*”).

²³⁷ HÉRON/LE BARS, para. 336.

²³⁸ In *Cesareo* the Cour de cassation had to decide whether two actions brought by the same claimant against the same defendant seeking the payment of a certain sum of money for works allegedly done without salary were based on the same cause. In the first action the claimant brought a claim for deferred

occasions and extended it to defendants²³⁹. As will be seen below, the Cour de cassation also extended this decision to arbitration²⁴⁰.

146. The position of the Cour de cassation in *Cesareo*, precluding parties from raising legal grounds which they could have relied upon in the first proceedings but failed to do so, echoes the English rule in *Henderson v Henderson*, as well as the US doctrine of claim preclusion.

Identity of object

147. Article 1351 CC further requires that “the thing claimed be the same” in both proceedings; there must be identity of objects. This requirement has also led to difficulties due to uncertainties surrounding the meaning of the term “object”. In addition, courts seem to use the term differently, depending on whether they examine the scope of a judge’s mandate or the identity of object requirement for *res judicata* purposes²⁴¹.

148. Under the NCPC the object of a dispute is determined generally by the parties’ claims, defined by the entirety of the parties’ submissions²⁴². Some scholars have suggested that the term has no legal connotation, leaving the task of applying the law to the judge alone²⁴³.

149. Article 1351 CC uses the term “the thing claimed” instead of the term “object”. When examining the identity of object requirement, the courts determine whether the parties in both proceedings ask for substantially the same thing and whether they assert

wages. When this claim was dismissed the claimant brought an action for unjust enrichment. The court held that both claims were based on identical causes because they both requested payment for works done without salary. See also Rapport Magendie of 24 May 2008, *Célérité et qualité de la justice devant la Cour d’appel*, pp. 45 *et seq.*

²³⁹ See also HÉRON/LE BARS, para. 335-1 with reference to Cour de cassation, 13 February 2008, *M. Jorge X v société civile immobilière du 24 rue des Petites Ecuries*, no. 06-22.093; Cour de cassation, 12 November 2008, no. 08-10.138.

²⁴⁰ See *infra*, paras 383 *et seq.*

²⁴¹ PERROT/FRICÉRO, para. 154.

²⁴² According to Article 4 NCPC “(1) [t]he subject matter of the dispute [object] is determined by the respective claims of the parties. (2) The originating process and the defence submissions define such claims. However, the subject matter of the dispute [object] may be modified by the interlocutory claims where they relate to the initial claims by a sufficient link”. See also PERROT/FRICÉRO, para. 154.

²⁴³ See PERROT/FRICÉRO, para. 154.

the same rights. There can be identity of the thing claimed only where a party asserts the same right over substantially the same thing²⁴⁴.

150. Finally, courts consider that under Article 1351 CC the term “object” generally covers only the final result reached in the *dispositif* of a decision, to the exclusion of decisions on preliminary issues. The *res judicata* doctrine does not bar a court in subsequent proceedings to decide a same issue again where the final thing claimed is not identical in both proceedings²⁴⁵. Accordingly, under Article 1351 CC the term “thing claimed” is not equivalent to the term “issue”²⁴⁶. While this principle is not generally and absolutely recognised in case law²⁴⁷, it stands to confirm that Article 1351 CC covers only the negative *res judicata* effect.

151. In practice it is often difficult to distinguish the requirements of identity of cause and identity of the thing claimed under Article 1351 CC. It has therefore been suggested to replace these two requirements by a single requirement, that of identity of the “question at issue” (“*matière litigieuse*”)²⁴⁸. However, this suggestion has not yet been followed in case law²⁴⁹. It has also been suggested that the *Cesareo* decision means abandoning the traditional triple identity test, essentially depriving the identity of cause requirement of its meaning²⁵⁰.

2.2. Switzerland

152. In Switzerland *res judicata* is referred to as “*materielle Rechtskraft*”, “*autorité de chose jugée*” (or “*force de chose jugée au sens matériel*”) and “*autorità di giudicato*”.

153. As in France, a distinction is drawn between “*autorité de chose jugée*” and “*force de chose jugée*” (or “*force de chose jugée au sens formel*”; “*formelle Rechtskraft*”; “*entrata in forza di cosa giudicata*”). A judgment has “*force de chose jugée*” when it is “final”, *i.e.* enforceable. It is no longer possible to bring ordinary means of recourse with suspensive effect against the

²⁴⁴ See PERROT/FRICÉRO, paras 154 *et seq.*; HENRY, para. 24, p. 2089.

²⁴⁵ See PERROT/FRICÉRO, paras 161 *et seq.*

²⁴⁶ PERROT/FRICÉRO, para. 162.

²⁴⁷ See PERROT/FRICÉRO, para. 163.

²⁴⁸ See PERROT/FRICÉRO, para. 127.

²⁴⁹ See PERROT/FRICÉRO, para. 127.

²⁵⁰ GRANDSARD; HÉRON/LE BARS, para. 336. See also LOQUIN, para. 9; MAYER, *Réflexions sur l'autorité négative de chose jugée*, para. 18.

decision²⁵¹. By contrast, a decision has “*autorité de chose jugée*” when it is “binding”; the decision may not be re-opened in subsequent proceedings between the same parties²⁵². While “*force de chose jugée*” relates to rights of recourse, “*autorité de chose jugée*” relates to the content of a decision. Unlike in France, in Switzerland a decision does not obtain “*autorité de chose jugée*” the moment it is rendered, but when it obtains “*force de chose jugée*”²⁵³.

154. In Switzerland the doctrine of *res judicata* pertains to procedure²⁵⁴. It is part of federal law if the claim is based on federal law²⁵⁵. The *res judicata* doctrine is not codified in federal law, but constitutes unwritten law. It is expressed in the decisions of the Swiss Federal Tribunal and legal authorities²⁵⁶.

155. The following analysis will cover the constituent elements (2.2.1.) and effects of a *res judicata* (2.2.2.), as well as the requirements that must be met for the *res judicata* doctrine to apply in Swiss federal law (2.2.3.).

2.2.1. Constituent elements of a *res judicata*

156. A *res judicata* is a judgment on the merits that finally determines a legal dispute between parties. Only the dispositive part of the judgment becomes *res judicata*.

A judgment

157. Judgments and any other judicial adjudication equivalent to a judgment may

²⁵¹ WALDER-RICHLI/GROB-ANDERMACHER, para. 1, p. 272 ; BERGER/KELLERHALS, para. 1494, p. 427.

²⁵² SPÜHLER/DOLGE/GEHRI, para. 193, p. 159; HOHL, paras 1264 and 1289 ; BERGER/KELLERHALS, para. 1494, p. 427..

²⁵³ HOHL, para. 1321; HABSCHEID, *L'autorité de la chose jugée en droit comparé*, p. 188 ; STAEHELIN/STAEHELIN/GROLIMUND, para. 9, p. 412.

²⁵⁴ HABSCHEID, *Schweizerisches Zivilprozess- und Gerichtsorganisationsrecht*, para. 475; MEIER, p. 239; SPÜHLER/DOLGE/GEHRI, paras 196 *et seq.*, p. 160 ; STAEHELIN/STAEHELIN/GROLIMUND, para. 8, p. 412; DTF 121 III 474, 477; DTF, *République de Pologne v Saar Papier Vertriebs-GmbH et tribunal arbitral CCI Zurich*, 20 September 2000, consid. 3.a, ASA Bulletin 2001, pp. 487 *et seq.*

²⁵⁵ DTF 4C.82/2006, consid. 3.1; DTF 125 III 241, 242; DTF 121 III 474, 476.

²⁵⁶ The unified Swiss Code of Civil Procedure (SCCP), which entered into force on 1 January 2011 to replace the 26 codes of civil procedure of the cantons, does not codify the *res judicata* doctrine. The federal law doctrine will continue to be unwritten law (see the Message of the Swiss Federal Council for the Swiss Federal Code of Civil Procedure, 28 June 2006, FF 2006 6841, *ad* Articles 232 to 236, p. 6953, available at www.ofj.admin.ch).

become *res judicata*²⁵⁷. It is of no importance whether the judgment is correct or not²⁵⁸.

A judgment on the merits

158. As a general rule, only decisions on the merits can become *res judicata*²⁵⁹. A decision is on the merits when a court renders a decision on the substance of a claim, *i.e.* whether the claim is well-founded or not²⁶⁰. However, the Federal Tribunal has held that a decision on the admissibility of a claim may become *res judicata*²⁶¹. It is also widely considered that a decision is on the merits for purposes of *res judicata* when a court dismisses a claim for lack of evidence or because the claim is not sufficiently substantiated²⁶².

159. Procedural decisions are generally not “on the merits” and, therefore, do not become *res judicata*²⁶³. Hence, procedural orders and decisions dealing only with the administration of the case do not become *res judicata*²⁶⁴.

160. Likewise, interim and conservatory measures generally do not become *res judicata*. While these measures are provisionally binding on the parties until they are rescinded or modified, the judge deciding the merits of the dispute is not bound by prior provisional measures²⁶⁵.

161. It was considered traditionally that judgments rendered in summary proceedings have *res judicata* effect only in subsequent summary proceedings, but not in subsequent ordinary proceedings²⁶⁶. However, the new Swiss Code of Civil Procedure provides for special summary proceedings in “clear cases” (Article 257 SCCP). Where the facts are

²⁵⁷ HABSCHIED, *Schweizerisches Zivilprozess- und Gerichtsorganisationsrecht*, para. 481; VULLIEMIN, para. 191. For a list of decisions capable of becoming *res judicata* see MEIER, p. 240.

²⁵⁸ HABSCHIED, *Schweizerisches Zivilprozess- und Gerichtsorganisationsrecht*, para. 501.

²⁵⁹ DTF 4C.82/2006, consid. 3.3; DTF 121 III 474, 477; HOHL, para. 1317. See also STAEHELIN/STAEHELIN/GROLIMUND, paras 10 *et seq.*, pp. 413 *et seq.*

²⁶⁰ DTF 4C.82/2006, consid. 3.3.

²⁶¹ DTF 115 II 187, consid. 3-a. See also HABSCHIED, *Schweizerisches Zivilprozess und Gerichtsorganisationsrecht*, para. 482.

²⁶² DTF 115 II 187, consid. 3-b; SPÜHLER/DOLGE/GEHRI, para. 202, p. 161; MEIER, p. 240.

²⁶³ SPÜHLER/DOLGE/GEHRI, para. 205, p. 161.

²⁶⁴ SPÜHLER/DOLGE/GEHRI, para. 207, p. 162; VULLIEMIN, para. 190.

²⁶⁵ HOHL, para. 1319; VULLIEMIN, para. 189.

²⁶⁶ HOHL, para. 1319; SPÜHLER/DOLGE/GEHRI, para. 204, p. 161; HABSCHIED, *Schweizerisches Zivilprozess und Gerichtsorganisationsrecht*, para. 481.

not disputed or may be readily established and the legal situation is clear, a claimant will have the possibility to obtain a judgment in summary proceedings and this judgment will have full *res judicata* effect²⁶⁷.

A final and binding decision

162. To become *res judicata* a decision must be “binding” (“*verbindlich*”; “*obligatoire*”); neither the parties nor a court in subsequent proceedings may call the decision into question²⁶⁸.

163. Given that a decision obtains “*autorité de chose jugée*” only when it has “*force de chose jugée*”, a decision must also be “final” in order to have *res judicata* effect. As stated above, this is the case when it is no longer possible to bring ordinary means of recourse with suspensive effect against the decision²⁶⁹.

A judicial tribunal with jurisdiction over the parties and the subject matter?

164. As in France, it is considered that a decision may become *res judicata* even if rendered by a tribunal lacking jurisdiction²⁷⁰.

The scope of res judicata

165. Only the *dispositif* of a judgment has *res judicata* effect²⁷¹; no *res judicata* effect attaches to the reasons underlying the judgment, even if they constitute the necessary foundation of the *dispositif*²⁷².

166. The reasons may be considered to interpret the meaning and scope of the *dispositif*. In particular, the reasons of a judgment may be examined to determine whether the claim in the subsequent proceedings is identical to the claim in the prior proceedings²⁷³. The reasons may also be examined to determine whether the prior

²⁶⁷ SPÜHLER/DOLGE/GEHRI, para. 204, p. 161.

²⁶⁸ DTF 4C.314/2004, consid. 11; DTF 4C.82/2006, consid. 3.3; DTF 5C.242/2003, consid. 2.1.

²⁶⁹ See *supra*, para. 153.

²⁷⁰ HABSCHEID, *L'autorité de la chose jugée en droit comparé*, p. 186; GULDENER, p. 387.

²⁷¹ WALDER-RICHLI/GROB-ANDERMACHER, para. 19, p. 275; MEIER, p. 241.

²⁷² HABSCHEID, *Schweizerisches Zivilprozess und Gerichtsorganisationsrecht*, para. 489.

²⁷³ DTF 121 III 474, consid. 4-a; DTF 4C.82/2006, consid. 3.3; DTF 4C.314/2004, consid. 1.3.

judgment was on the merits or procedural²⁷⁴.

167. No *res judicata* effect attaches to the determinations of preliminary issues in the prior judgment. Likewise, the *res judicata* effect of the *dispositif* does not cover implicit decisions²⁷⁵.

168. Swiss law provides for two exceptions to the general rule that only the *dispositif* of a judgment becomes *res judicata*²⁷⁶. The first exception applies in case of set-off²⁷⁷. The decision on set-off only appears in a judgment's reasons. However, it is widely accepted that the *res judicata* effect of the *dispositif* covers the decision on set-off, whether the court admits or dismisses the claim for set-off²⁷⁸. The second exception applies where the *dispositif* of a judgment of reference expressly states that the appeal is admitted according to the reasons of the judgment. In this case, the reasons have *res judicata* effect and the court to which the case is referred must base its new judgment on the reasons of the judgment of reference²⁷⁹.

2.2.2. Effects of a *res judicata*

169. A judgment that has *res judicata* effect is binding upon the parties and courts in subsequent proceedings. Swiss law recognises both a negative and positive *res judicata* effect. This means that the same claim cannot be brought again in subsequent proceedings (negative *res judicata* effect). This includes contradictory claims or claims contained in the claim decided in the prior proceedings. It also means that the *res judicata* constitutes the final and binding determination of a preliminary issue in the subsequent proceedings. If the court in subsequent proceedings has to decide a preliminary issue that has already been decided in the *dispositif* of a prior judgment, the court is bound by the prior judgment and must implement it in its judgment (positive

²⁷⁴ According to the Federal Tribunal, when determining whether a prior judgment is on the merits or procedural a court must only consider the contents of the prior judgment. The denomination of the prior judgment is of no importance (DTF 4C.82/2006, consid. 3.4; DTF 115 II 187, consid. 3-b).

²⁷⁵ DTF 121 III 474, 478.

²⁷⁶ HOHL, paras 1312 *et seq.*

²⁷⁷ See WALDER-RICHLI/GROB-ANDERMACHER, paras 23 *et seq.*, pp. 276 *et seq.*

²⁷⁸ MEIER, p. 242; HABSCHEID, *Schweizerisches Zivilprozess und Gerichtsorganisationsrecht*, paras 496 *et seq.*; SPÜHLER/DOLGE/GEHRI, paras 200 *et seq.*, pp. 160 *et seq.*; GULDENER, p. 369. According to some commentators, the court's decision rejecting the claim for set-off does not become *res judicata* (see, e.g., WALDER-RICHLI/GROB-ANDERMACHER, para. 27, p. 278).

²⁷⁹ HOHL, para. 1314.

res judicata effect)²⁸⁰.

170. The doctrine of *res judicata* precludes only the re-litigation of claims and not of issues due to the strict limitation of any *res judicata* effects to the *dispositif* of the judgment.

2.2.3. Requirements for the application of the doctrine of *res judicata*

171. The doctrine of *res judicata* applies only if the “parties” and the “subject matter in dispute” are identical in both proceedings.

Identity of parties

172. As a general rule, the *res judicata* effect of a judgment extends only to the parties and their successors, including both universal successors and successors having a specific title²⁸¹. The parties’ respective roles in the proceedings may change. However, the parties must stand in an adversarial relation to each other in both proceedings²⁸².

173. A judgment generally has no *res judicata* effect for third persons. There are, however, exceptions to this rule. One such exception applies in case of “*Prozessstandschaft*”²⁸³. In this case, although the person denominated as party conducts the proceedings in his own name, he does not act for himself but for a third person. The *res judicata* effect of the judgment extends to the third person although not a party to the proceedings²⁸⁴. Another exception applies where persons who were involved in the disputed legal relationship - but not in the proceedings - declare in advance that they agree to be bound by the judgment²⁸⁵.

Identity of subject matter in dispute

174. The doctrine of *res judicata* applies only if there is identity of the subject matter

²⁸⁰ HOHL, paras 1289 *et seq.*; HABSCHIED, *Schweizerisches Zivilprozess und Gerichtsorganisationsrecht*, paras 485 *et seq.*; SPÜHLER/DOLGE/GEHRI, paras 194 *et seq.*, p. 159. See also DTF 121 III 474, 478.

²⁸¹ STAEHELIN/STAEHELIN/GROLIMUND, para. 15, p. 415.

²⁸² HABSCHIED, *Schweizerisches Zivilprozess und Gerichtsorganisationsrecht*, para. 502.

²⁸³ STAEHELIN/STAEHELIN/GROLIMUND, para. 15, p. 415; BERGER/KELLERHALS, para. 1507, p. 432.

²⁸⁴ See HABSCHIED, *Schweizerisches Zivilprozess und Gerichtsorganisationsrecht*, para. 509.

²⁸⁵ DTF 89 II 429, 435.

in dispute (“*Streitgegenstand*”; “*object du litige*”) in the prior and subsequent proceedings²⁸⁶.

175. There are divergent views as to what constitutes the subject matter of a dispute. According to some scholars, the subject matter of a dispute is comprised of the legal rule relied upon by a party as the legal basis of the claim. According to others, the subject matter of a dispute is defined by the relief sought in the parties’ submissions. Still others suggest that the subject matter of a dispute comprises both the parties’ claims and the set of facts relied upon in support the claims²⁸⁷.

176. Since several years the Federal Tribunal follows the view that the subject matter in dispute comprises both the parties’ claims and set of facts supporting the claims. In addition, the Federal Tribunal held that the the parties’ claims must also be based on the same legal grounds (or cause; “*Rechtsgrund*”)²⁸⁸. It is however unclear what meaning the Federal Tribunal attributes to the term “*Rechtsgrund*”²⁸⁹.

177. In 2008 the Federal Tribunal seemingly applied a broader definition, defining of the notion “subject matter in dispute” only with regard to the facts relied upon in support of the claim, without reference to legal grounds:

“[there is identity of the subject matter in dispute if] in both proceedings the parties have submitted the same claim based on the same facts [...]. The claims have to be substantially the same; it is neither necessary nor important that the claims made in the submissions are expressed in the same terms in both proceedings [...]. A new action will have an identical subject matter in dispute if the new claim was already contained in the claim already decided, if it was simply the opposite of the decided claim, or if it arises only as a preliminary matter, whereas it constituted the main issue in the first proceedings

²⁸⁶ DTF 4C.314/2004, consid. 1.3; DTF 123 III 16, 18; DTF 121 III 474, 477 ; DTF 125 III 241, 242. See also HABSCHEID, *Schweizerisches Zivilprozess und Gerichtsorganisationsrecht*, para. 492; HOHL, paras 1298 *et seq.*

²⁸⁷ See HABSCHEID, *Schweizerisches Zivilprozess und Gerichtsorganisationsrecht*, paras 492 *et seq.*; WALDER-RICHLI/GROB-ANDERMACHER, paras 46 *et seq.*, pp. 282 *et seq.*; SPÜHLER/DOLGE/GEHRI, paras 1 *et seq.*, pp. 121 *et seq.*; MEIER, pp. 200 *et seq.*

²⁸⁸ In DTF 123 III 16, 19 the Federal Tribunal held that there is identity of subject matters where the same claim, based on the same legal ground and set of facts, is re-submitted to the court for adjudication (“*Eine abgeurteilte Sache liegt vor, wenn der streitige Anspruch mit einem schon rechtskräftig beurteilten identisch ist. Dies trifft zu, falls der Anspruch dem Richter aus demselben Rechtsgrund und gestützt auf denselben Sachverhalt erneut zur Beurteilung unterbreitet*”). See also MEIER, pp. 201 *et seq.*

²⁸⁹ See MEIER, p. 204.

[...]. Furthermore, the subject matter in dispute covers all facts that were part of the set of facts [in the prior proceedings], including all facts that the [first] judge could not have considered, either because they were not invoked before him, or because they were not raised in a proper and timely fashion, or because they were not sufficiently substantiated [...]²⁹⁰.

178. So far the Federal Tribunal has not suggested that there should also be identity of subject matters in dispute where a new claim could and should have been brought in the prior proceedings, akin to the decision of the French Cour de cassation in *Cesareo*. However, in 2002 the Federal Tribunal applied a broad definition of “identity of subject matters in dispute” with regard to *lis pendens*. Holding that there is identity of subject matter in dispute where two claims are based on the same set of facts, it found that an action to determine the non-existence of a right (“*action en constat négative*”) had the same subject matter as an action to establish compensation rights (“*action condamnatoire*”) ²⁹¹. Because the Federal Tribunal so far has not extended this broader definition to *res judicata*, the definition of the term “subject matter in dispute” varies depending on whether an issue of *lis pendens* or *res judicata* is raised²⁹².

3. CONCLUSION

179. The analysis of the laws of England, the United States, France and Switzerland shows that the doctrine of *res judicata* is not applied uniformly in domestic laws. Differences exist not only between common law and civil law countries, but also among countries belonging to the same legal tradition. While on a general level domestic laws on *res judicata* reveal a common core, as is often the case, “the devil is in the detail”.

²⁹⁰ DTF 5A_337/2008, consid. 4.1. (“*Il y a chose jugée sur un même objet quand, dans l'un et l'autre procès, les parties ont soumis au juge la même prétention en se fondant sur les mêmes faits [...]. L'identité de l'objet du litige s'entend au sens matériel; il n'est cependant pas nécessaire, ni même déterminant, que les conclusions soient formulées de manière identique [...]. Le Tribunal Fédéral a admis que, même si elle s'en écarte par son intitulé, une nouvelle conclusion aura un objet identique à celle déjà jugée, si elle était déjà contenue dans celle-ci, si elle est simplement son contraire ou si elle ne se pose qu'à titre préjudiciel, alors que, dans le premier procès, elle se posait à titre principal [...]. L'identité de l'objet s'étend en outre à tous les faits qui font partie du complexe de faits, y compris les faits dont le juge n'a pas pu tenir compte parce qu'ils n'ont pas été allégués, qu'ils ne l'ont pas été selon les formes et à temps ou qu'ils n'ont pas été suffisamment motivés [...]*”).

²⁹¹ DTF 128 III 284, consid. 3b (“*Si elles opposent les mêmes parties et portent sur le même complexe de faits, une action négatoire et une action condamnatoire doivent ainsi être considérées comme identiques au sens de l'art. 35 LFors. [...] [L]a coexistence des deux actions crée un risque de décisions contradictoires. Or, l'art. 35 LFors, qui tend précisément à éviter des jugements contradictoires, doit être interprété de manière à écarter un tel risque*”).

²⁹² MEIER, pp. 200 *et seq.*

180. The scope and application of the doctrine of *res judicata* varies from one country to another. The scope of the doctrine is generally wider in common law countries than in civil law countries, encompassing issue preclusion in addition to claim preclusion. As was stated by Brekoulakis

“[i]n common law countries, the *res judicata* doctrine prevents the relitigation not only of claims, but also of issues, factual and legal, adjudicated in the prior judgment. From this it appears that common law countries consider that a judgment represents a judicial record of what actually happened with regard to the dispute. *Res judicata* in this sense carries a fact-finding value. It is considered as a means of evidence, as an authoritative determination of the whole “story” of the dispute. In contrast, in civil law countries, the *res judicata* doctrine is normally confined to the claims rather than the issues determined in a judgment. The prevailing view is to separate *res judicata* from any fact-finding power. A judicial determination is regarded as fallible by nature and, in that sense, can only determine the legal consequences of what seems to have happened rather than determine what actually happened, that is, the facts. Parties are thus free to relitigate facts determined in a judgment simply because *res judicata* does not bear any evidentiary significance”²⁹³.

181. The wider common law approach appears to be motivated by reasons of procedural economy and efficiency and the concern to avoid contradictory decisions²⁹⁴. By contrast, the reason underlying the civil law approach is that the importance of a legal action and a specific issue figuring in that action could differ widely in relation to another legal action; a party might not invest so much effort in one particular issue in the first litigation because of the relative insignificance of either the issue or the claim. The situation could be radically different in a subsequent action. The granting of *res judicata* effects to a decisions’ reasoning could thus lead to results that were unforeseen by the parties²⁹⁵.

182. In addition, while civil law countries recognise the abuse of rights doctrine, they do not distinguish the abuse of process doctrine which, in some common law countries, prevents a party from raising a subject matter that was not, but could and should have

²⁹³ BREKOULAKIS, pp. 182 *et seq.*

²⁹⁴ HÉRON, para. 12.

²⁹⁵ SÖDERLUND, p. 302 ; MEIER, p. 241 ; HÉRON, para. 13.

been brought by that party during prior proceedings²⁹⁶. However, it was seen that in recent years, courts in France have given a broader interpretation to the notion of identity of disputes. In particular, French courts have applied the *res judicata* doctrine to avoid the litigation of claims arising out of a same set of facts where the claim could have been brought in prior proceedings. In Switzerland, a broader definition of the subject matter in dispute has been admitted only with respect to *lis pendens*.

183. The analysis has shown that the requirements that must be met for the *res judicata* doctrine to apply vary from one jurisdiction to another. Although it is widely required that there must be identity of parties and questions at issue, there are several differences in the definitions of the notions of “parties”, “question at issue”, or “object” and “cause”. These notions are often applied and interpreted differently as between domestic laws and even as between courts and scholars. They generally appear to be interpreted more broadly in common law jurisdictions where the binding effects of a judgment commonly extend to a wider category of persons who are not parties but are closely related to the dispute. Likewise, in common law jurisdictions the cause of action is interpreted more broadly and pragmatically in light of the entire dispute to comprise all claims based on substantially the same facts and evidence, whether or not they were brought in prior proceedings²⁹⁷. However, as mentioned in the previous paragraph, courts in France seem to now adopt a similar approach.

184. It was seen that the moment when a judgment becomes *res judicata* may also vary from one country to another. In England a judgment becomes *res judicata* when perfected by formal entry²⁹⁸. In the US²⁹⁹ and France³⁰⁰ it becomes *res judicata* when it is rendered. In Switzerland a judgment becomes *res judicata* when it may no longer be contested³⁰¹.

185. Finally, in Switzerland the doctrine of *res judicata* is part of procedural public

²⁹⁶ ILA, *Interim Report*, p. 14; BREKOULAKIS, pp. 182 *et seq.*

²⁹⁷ See KREMSLEHNER, pp. 134 *et seq.*

²⁹⁸ See *supra*, para. 42.

²⁹⁹ See *supra*, para. 86.

³⁰⁰ See *supra*, paras 123 *et seq.*

³⁰¹ See *supra*, paras 162 *et seq.*

policy and courts must consider *res judicata* issues *ex officio*³⁰². While in France the *res judicata* doctrine is not part of public policy, French courts may consider *res judicata* issues *ex officio*³⁰³. By contrast, in England³⁰⁴ and the US³⁰⁵ the doctrine serves only the private interest of the parties. *Res judicata* must generally be raised and pleaded by the parties. It is not part of public policy and is deemed to be waived if not raised³⁰⁶.

186. The existing differences between domestic laws on *res judicata* render its application in international arbitration problematic. Even if it was admitted that the wholesale application of domestic *res judicata* rules was possible and appropriate to coordinate jurisdictions between different arbitral tribunals or between arbitral tribunals and state courts, an effective application of domestic *res judicata* rules in international arbitration would require the formulation either of generally accepted *res judicata* principles or of a generally accepted conflict-of-laws rule. Chapter five will discuss the appropriateness of these last two approaches in further detail.

187. With regard to the formulation of generally accepted *res judicata* principles guidance could be sought in international law. It will thus be useful to analyse the *res judicata* doctrine in international law.

³⁰² See, e.g., DTF 4A_490/2009, consid. 2.1; DTF 4P.98/2005, consid. 5.1; DFT 128 III 191, 194; DFT 127 III 279, 283.

³⁰³ Until 2005 French courts were not allowed to consider the *res judicata* doctrine *ex officio*. However, on 1 January 2005 the décret of 20 August 2004 came into force. This décret modifies Article 125 NCPC; French courts may now consider *res judicata* issues *ex officio*. The doctrine is no longer considered as serving only the private interests of the parties. However, the doctrine of *res judicata* is generally not considered to be part of public policy. See, e.g., JAROSSON, *L'autorité de la chose jugée des sentences arbitrales*; NOURISSAT.

³⁰⁴ See HANDLEY, paras 18.03 *et seq.*

³⁰⁵ ALI, *Restatement (Second), Judgments*, § 15.

³⁰⁶ HANOTIAU, *L'autorité de la chose jugée des sentences arbitrales*, p. 51; ILA, *Interim Report*, p. 15.

CHAPTER 2

The Doctrine of *Res Judicata* in International Law

188. The problem of multiple proceedings and conflicting judgments is dealt with differently depending on whether it arises in a private or public international law setting.

189. In private international law there have been several attempts to find harmonised solutions. In Europe the EC Regulation No. 44/2001 seeks to avoid multiple proceedings and conflicting judgments by unifying rules on jurisdiction and the recognition and enforcement of judgments. Globally a similar attempt, albeit much more restricted in scope, has been made by the adoption of the Hague Convention on Choice of Court Agreements. In 2004, ALI and UNIDROIT proposed transnational principles of civil procedure.

190. Neither the EC Regulation No. 44/2001 nor the Convention on Choice of Court Agreements refer to the doctrine of *res judicata*. By contrast, the ALI/UNIDROIT Principles of Transnational Civil Procedure contain a *res judicata* provision. These attempts of harmonisation provide inspiration as to how *res judicata* issues may be dealt with outside the domestic law context and are thus useful for the development of *res judicata* principles for international arbitration.

191. In public international law the doctrine of *res judicata* was developed on the basis of domestic *res judicata* rules. Thus, the public international law doctrine of *res judicata*

also constitutes a useful source of inspiration for the development of *res judicata* principles for international arbitration.

192. The following analysis will examine how the problem of multiple proceedings and conflicting judgments is dealt with in private international law (1.). It will then analyse how the doctrine of *res judicata* is currently applied in public international law by international courts and tribunals (2.).

1. PRIVATE INTERNATIONAL LAW

193. The EC Regulation No. 44/2001, the Hague Convention on Choice of Court Agreements, and the ALI/UNIDROIT Principles of Transnational Civil Procedure all regulate the relations between domestic courts belonging to different jurisdictions.

194. One objective of this research is to demonstrate that *res judicata* issues arising before international arbitrators should not be governed by any particular domestic law, but by transnational standards. The private international law instruments mentioned above constitute attempts to find such standards. This section will examine these instruments in the order listed.

1.1. The EC Regulation No. 44/2001

195. The EC Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (JR) aims to provide for the free movement of judgments between EU Member States. To achieve this aim the Regulation imposes unified rules of conflict of jurisdiction that prescribe which Member State has jurisdiction over particular matters. The Regulation further facilitates the recognition and enforcement of judgments rendered in Member States.

196. Multiple proceedings and conflicting judgments are contrary to the aim of the Regulation. Articles 27 and 28 JR seek to prevent that identical or related proceedings are brought in parallel before the courts of different Member States. While Article 27 provides for the application of the *lis pendens* doctrine³⁰⁷, Article 28 JR concerns related

³⁰⁷ Like the *res judicata* doctrine, the *lis pendens* doctrine applies only in case of “proceedings involving the same cause of action and between the same parties” (Article 27 (1) JR).

actions³⁰⁸.

197. Articles 27 and 28 seek not only to uphold proper administration of justice and economy of procedure, but also to avoid that courts in different Member States render irreconcilable judgments. They are designed to preclude, as far as possible and from the outset, the possibility of a situation where the recognition of a judgment would be refused on the grounds that it is irreconcilable with another judgment³⁰⁹. This ground for non-recognition is provided for in Article 34 JR. According to Article 34 (3) and (4), a judgment given in a Member State shall not be recognised

“3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;

4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed”.

198. The general idea underlying Article 34 (3) and (4) is to avoid the existence of two irreconcilable judgments in one and the same Member State³¹⁰. According to the Report of the Committee of Experts for the Brussels Convention,

“[t]here can be no doubt that the rule of law in a State would be disturbed if it were possible to take advantage of two conflicting judgments”³¹¹.

199. Article 34 (3) and (4) JR is of minor practical importance as Articles 27 and 28 JR are usually sufficient to avoid irreconcilable judgments³¹². A review of case law has shown that Articles 27 and 28 are generally respected and largely prevent conflicting

³⁰⁸ Article 28 (3) JR states: “For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings”.

³⁰⁹ ECJ, *Maersk Olie & Gas A/S v Firma M de Haan en W de Boer*, Case C-39/02, 14 October 2004, ECR 2004, p. I-09657, para. 31; ECJ, *Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd v New Hampshire Insurance Company*, Case C-351/89, 27 June 1991, ECR 1991, p. I-03317, para. 16; ECJ, *Gubisch Maschinenfabrik KG v Giulio Palumbo*, Case 144/86, 8 December 1987, ECR 1987, p. 04861, para. 8. See also, HESS/PFEIFFER/SCHLOSSER, para. 403.

³¹⁰ GAUDEMET-TALLON, para. 419.

³¹¹ JENARD, p. 45.

³¹² JENARD, p. 45.

judgments. Consequently, Article 34 (3) and (4) JR is applied only rarely³¹³. The ECJ had only few occasions to clarify the meaning of Article 27 of the Brussels Convention (BC), which is almost identical to Article 34 JR.

200. In *Solo Kleinmotoren GmbH v Bloch*, the ECJ held that the term “judgment” must be defined pursuant to Article 25 BC (Article 32 JR) according to which

“‘judgment’ means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court”.

201. In *Hoffmann v Krieg*, the ECJ held that:

“[i]n order to ascertain whether the two judgments are irreconcilable within the meaning of Article 27 (3), it should be examined whether they entail legal consequences that are mutually exclusive”³¹⁴.

202. The irreconcilability thus lies in the effects of the judgments³¹⁵.

203. Article 34 (3) JR does not apply where proceedings are still pending in the Member State where recognition is sought³¹⁶; the judgments must both have been rendered. The question which judgment was rendered first is of no importance; the judgment rendered in the Member State where recognition is sought always prevails over the foreign judgment³¹⁷.

204. Two judgments may entail legal consequences that are mutually exclusive and thus be irreconcilable within the meaning of Article 34 (3) JR, even though they were not rendered on the same subject matter³¹⁸, and even if the judgment rendered in the Member State where recognition is sought concerned a subject matter outside the scope

³¹³ HESS/PFEIFFER/SCHLOSSER, para. 563.

³¹⁴ ECJ, *Hoffmann v Krieg*, Case 145/86, 4 February 1988, ECR 1988, p. 00645, para. 22.

³¹⁵ KROPHOLLER, para. 49, pp. 410 *et seq.*

³¹⁶ GAUDEMET-TALLON, para. 420.

³¹⁷ KROPHOLLER, para. 54, p. 412. It has been suggested that Article 34 (3) is not in line with Articles 27 and 28 of the Regulation as it gives preference to a judgment given without respecting the *lis pendens* of the same lawsuit in another Member State (see HESS/PFEIFFER/SCHLOSSER, para. 564).

³¹⁸ KROPHOLLER, para. 49, p. 410.

of the Regulation³¹⁹.

205. By contrast, the two judgments must have been rendered between the same parties. The term “same parties” has the same meaning as in Article 27 JR. In *Tatry v Maciej Rataj*, the ECJ held that

“[...] the question whether the parties are the same cannot depend on the procedural position of each of them in the two actions, and that the plaintiff in the first action may be the defendant in the second”³²⁰.

206. The ECJ further held that the requirement of party identity is met even where only some of the parties were identical in both proceedings³²¹. This means that a judgment can be refused recognition partially, *i.e.* to the extent to which the parties to both judgments are the same.

207. Finally, in the *Drouot* case the ECJ held that parties, although formally not identical, may nevertheless be deemed to be the same party if there is such a degree of identity between the interests of them that a judgment delivered against one of them would have the force of *res judicata* against the other. In this case the ECJ decided that an insurer and its insured may be considered as the same party for the purposes of *lis pendens*

“where an insurer, by virtue of its right of subrogation, brings or defends an action in the name of its insured without the latter being in a position to influence the proceedings”³²².

208. Unlike Article 34 (3), Article 34 (4) requires that the judgments were rendered on the same cause of action. The term “cause of action” is the same as in Article 27 JR (Article 21 BC). The European notion of “cause of action” is characterised by its broad

³¹⁹ See ECJ, *Hoffmann v Krieg*, cited *supra*, fn 314, para. 17; GAUDEMET-TALLON, para. 420.

³²⁰ ECJ, *Tatry v Maciej Rataj*, Case C-406/92, 6 December 1994, ECR 1994, p. I-05439, para. 30.

³²¹ ECJ, *Tatry v Maciej Rataj*, cited *supra*, fn 320, paras 33 *et seq.*

³²² ECJ, *Drouot assurances SA v Consolidated metallurgical industries et al.*, Case C-351/96, 19 May 1998, ECR 1998, p. I-03075, paras 19 *et seq.* See also *Molnhycke Health Care AB et al v BSN Medical Ltd et al* [2009] EWHC 3370 (“A mandatory stay of English proceedings pending resolution of foreign proceedings under Regulation 44/2001 art. 27 would only arise where the parties were identical and indissociable. Where foreign proceedings had been issued against a patentee, but not the exclusive licensee of the patent, English proceedings against both of them would not be stayed under art. 27 as the licensee had been granted a specific right which was additional to the right which the patentee continued to hold, so that its interests were different and the parties were not, accordingly, identical and indissociable”).

scope. Two proceedings involve the same cause of action once the same subject matter “lies at the heart of the two actions”³²³.

209. In *Tatry v Maciej Rataj* the ECJ noted that even though the English version of Article 21 BC does not expressly distinguish between the concepts of “object” and “cause”, the term “cause of action” should be construed in the same manner as other language versions in which that distinction is made. Accordingly, the ECJ held that

“the ‘cause of action’ comprises the facts and the rule of law relied on as the basis of the action”³²⁴.

210. Concerning the object, the ECJ stated that

“[t]he ‘object of the action’ [...] means the end the action has in view”³²⁵.

211. Applying this definition of the term “cause of action”, the ECJ concluded that an action seeking to have the defendant held liable for causing loss and ordered to pay damages has the same cause and object as earlier proceedings brought by that defendant seeking a declaration that he is not liable for that loss³²⁶.

212. Under Article 34 (4) JR the conflict between two irreconcilable judgments is solved in favour of the “earlier judgment”; only the “earlier judgment” may be recognised. The “earlier judgment” within the meaning of Article 34 (4) JR is the judgment that was rendered first in time³²⁷.

213. At first glance the EC Regulation No. 44/2001 does not appear to solve the problem of duplications of proceedings and conflicting judgments by means of the doctrine of *res judicata*. There is no provision in the Regulation directly and expressly precluding a court in a Member State to decide a dispute that has already been decided in prior proceedings between the same parties in another Member State. However, an argument may be made that it does so implicitly by means of Article 33 (1) JR, which

³²³ HESS/PFEIFFER/SCHLOSSER, para. 406, quoting ECJ, *Gubisch Maschinenfabrik KG./Giulio Palumbo*, Case C-144/86, 8 December 1987, ECR 1987, p. 4861, para. 16.

³²⁴ ECJ, *Tatry v Maciej Rataj*, cited *supra*, fn 320, para. 38.

³²⁵ ECJ, *Tatry v Maciej Rataj*, cited *supra*, fn 320, para. 40.

³²⁶ ECJ, *Tatry v Maciej Rataj*, cited *supra*, fn 320, para. 44.

³²⁷ KROPHOLLER, para. 56, p. 413.

provides for the automatic recognition of judgments rendered under the Regulation. According to Barnett, Article 33 (1) clearly intends to prevent the re-litigation in a Member State of a cause of action that has already been finally determined in another Member State³²⁸. However, the Regulation is silent as to the scope and extent of the preclusive effects of judgments rendered under the Regulation, as well as to the law governing the preclusive effects of a prior judgment in subsequent proceedings.

214. According to Jenard, a judgment rendered in one Member State must be accepted in the recognising Member State with the original preclusive effects it would have in the country in which it was rendered³²⁹. This was also the approach adopted by the ECJ in *Hoffmann v Krieg*³³⁰. Barnett, however, suggests that while the Regulation seems to implicitly require the extension of cause of action preclusive effects, the same does not hold true with respect to issue preclusion and abuse of process. According to Barnett, a court in the recognising state may afford issue preclusive effects to a foreign judgment, even if it was rendered in a Member State that does not know the doctrine of issue estoppel³³¹. Similarly, with respect to abuse of process, Barnett argues that it is a preclusive plea only in the sense that the recognising court exercises its discretion to prevent its own process from being abused, thereby precluding the party that invoked it. The plea reposes entirely in the discretion of the recognising court³³². A recognising court, applying its abuse of process doctrine, may preclude a party from raising a subject matter which could and should have been raised in earlier proceedings in another Member State.

³²⁸ BARNETT, para. 9.13. See also ECJ, *De Wolf v Cox BV*, Case 42/76, 30 November 1976, ECR 1976, p. 01759.

³²⁹ JENARD, p. 43 (“Recognition must have the result of conferring judgments the authority and effectiveness accorded to them in the State in which they were given”). See also LASOK/STONE, pp. 289 *et seq.*

³³⁰ ECJ, *Hoffmann v Krieg*, Case 145/86, 4 February 1988, 1988 ECR, p. 645 (“A foreign judgment which has been recognised by virtue of Article 26 of the Convention must in principle have the same effects in the State in which enforcement is sought as it does in the State in which judgment was given”). See also ECJ, *Amministrazione dell’Economia e delle Finanze and Agenzia delle Entrate v Fallimento Olimpiclub Srl*, Case C-2/08, 3 September 2009, 2009 ECR, p. I-07501 at para. 24 (“In the absence of Community legislation in this area, the rules implementing the principle of *res judicata* are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law (principle of effectiveness))”.

³³¹ See BARNETT, paras 7.75 *et seq.*

³³² BARNETT, para. 7.95.

1.2. The Convention on Choice of Court Agreements

215. The Convention on Choice of Court Agreements was adopted by the Hague Conference on Private International Law on 30 June 2005³³³. The Convention has not yet entered into force as it has been ratified only by Mexico. However, the Convention has been signed by the United States and the European Community. Pursuant to Article 31 of the Convention, only two ratifications are needed for the Convention to enter into force³³⁴.

216. The aim of the Convention is to provide certainty and ensure effectiveness of exclusive choice of court agreements. The Convention seeks to ensure that, first, the chosen court hears the dispute when proceedings are brought before it; second, any other court before which proceedings are brought refuses to hear the dispute; and third, the judgment of the chosen court is recognised and enforced³³⁵. To achieve its aims, the Convention adopts uniform rules on jurisdiction and on recognition and enforcement of foreign judgments.

217. The Convention is of interest for this research as it considers the relationship between a court chosen by an exclusive choice of court agreement and a court not chosen. This relationship resembles the relationship between an arbitral tribunal (chosen by an arbitration agreement) and a state court, *i.e.* a court not chosen.

218. The Convention does not expressly adopt the doctrine of *res judicata*. Furthermore, it heavily restricts the application of the *lis pendens* doctrine. It even precludes the chosen court from applying the doctrine of *lis pendens* to decline jurisdiction in favour of a court in another state. The Convention thereby seeks to ensure that only the chosen court will decide the dispute covered by the choice of court agreement. This is the aim of Articles 5 and 6 of the Convention. According to Article 5 (1),

“[t]he court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to

³³³ On the history of this Convention, see, *e.g.*, WAGNER, pp. 102 *et seq.*

³³⁴ The Convention is available at www.hcch.net.

³³⁵ HARTLEY/DOGAUCHI, para. 1.

decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State”.

219. Article 5 (1) firmly grounds the exclusive jurisdiction of the chosen court. The chosen court’s obligation to decide the dispute is corroborated by Article 5 (2), in accordance with which

“[a] court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State”.

220. According to the Explanatory Report on the Convention on Choice of Court Agreements, a court might consider that the dispute should be decided in a court of another state on the basis of *forum non conveniens* or *lis pendens*. Article 5 (2) of the Convention precludes resort to either of these doctrines if the court in whose favour the proceedings would be stayed or dismissed is in another state³³⁶. This is justified by the legitimate expectation of the parties to have the chosen court decide the dispute³³⁷.

221. To avoid parallel proceedings before a chosen court and a court not chosen, Article 6 of the Convention obliges any courts not chosen, but nonetheless seised of the dispute, to suspend or dismiss proceedings that are covered by an exclusive choice of court agreement unless

- a) the agreement is null and void under the law of the State of the chosen court;
- b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;
- c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;
- d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
- e) the chosen court has decided not to hear the case”.

³³⁶ HARTLEY/DOGAUCHI, paras 132 *et seq.* The Convention does not prevent a chosen court from declining jurisdiction in favour of another court within the same state (Article 5 (3)(b) Convention on Choice of Court Agreements; KESSEDJIAN, para. 38).

³³⁷ KESSEDJIAN, para. 37.

222. Pursuant to Article 6 (a), the court not chosen shall assess the validity of the choice of court agreement under the law of the chosen court. Likewise, Article 5 (1) provides that the chosen court shall examine whether the choice of court agreement is null and void pursuant to its *lex fori*. Both courts will therefore apply the same law to assess the validity of the choice of court agreement. This choice-of-law rule was included to ensure uniform results³³⁸, which is essential to avoid contradictory decisions and to prevent positive and negative conflicts of jurisdiction.

223. The application of the law of the country of the chosen court appears appropriate. It is the law the parties would legitimately expect the chosen court to apply to assess the validity of the choice of court agreement. A court not chosen should also apply the law of the chosen court. In line with the parties' legitimate expectations, it has to determine whether the choice of court agreement can have effects in the country of the chosen court. The court not chosen can only have jurisdiction over the dispute if the choice of court agreement proves null and void in the country of the chosen court. The reference in the Convention to the law of the country of the chosen court includes choice-of-law rules³³⁹. This does not seem to cause major problems as both the chosen court and the court not chosen will apply the same choice-of-law rules to determine the law governing the validity of the choice of court agreement.

224. Article 6 (b) of the Convention prescribes the court not chosen to examine the parties' capacity to conclude the choice of court agreement in application of its own *lex fori*. While Article 5 (1) does not expressly prescribe the chosen court to examine the parties' capacity to conclude the agreement, it is considered that the provision includes lack of capacity since a lack of capacity would render the choice of court agreement null and void³⁴⁰. Hence, the chosen court and the court not chosen will both apply their own *lex fori*, including choice-of-law rules³⁴¹. If these conflict-of-laws rules determine different laws to govern the capacity of the parties, the courts will assess the capacity of the parties under different laws. There is thus a risk that both courts will reach different

³³⁸ BRAND/HERRUP, p. 81.

³³⁹ HARTLEY/DOGAUCHI, para. 125.

³⁴⁰ HARTLEY/DOGAUCHI, paras 126 and 149.

³⁴¹ HARTLEY/DOGAUCHI, para. 150.

conclusions on this issue³⁴².

225. The exceptions in Article 6 (c) and (d) of the Convention may also give rise to parallel proceedings. However, the risk of parallel proceedings under these provisions is small as these exceptions will only arise rarely in practice³⁴³. No problem of parallel proceedings can arise under Article 6 (e) as it concerns the case where the chosen court has declined to exercise its jurisdiction.

226. Where Articles 5 and 6 cannot avoid parallel proceedings and where, as a consequence, conflicting judgments are rendered, the Convention on Choice of Court Agreements seeks to prevent the recognition or enforcement of two conflicting judgments in a same Contracting State by the same means as EC Regulation No. 44/2001. According to Article 9 of the Convention:

“Recognition or enforcement may be refused if –

[...]

f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or

g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State”.

227. The wording of Article 9 (f) and (g) is similar, but not identical, to Article 34 (3) and (4) JR. In particular, Article 9 of the Convention uses the term “inconsistent” instead of “irreconcilable”.

228. The Convention does not define the terms “inconsistent judgments” or “another State”. It is not certain whether an application of Article 9 (g) and (f) requires two judgments to be merely “conflicting and contradictory” or whether they must be “irreconcilable”, *i.e.* giving rise to mutually exclusive legal consequences³⁴⁴. It is equally not certain whether in Article 9 (g) the term “another State” refers solely to another

³⁴² On Article 6 (b), see BRAND/HERRUP, pp. 90 *et seq.*

³⁴³ KESSEDJIAN, paras 43 *et seq.*

³⁴⁴ A distinction between “irreconcilable” and “conflicting and contradictory” is made under the EC Regulation No. 44/2001. See ECJ, *Tatry v Maciej Rataj*, cited *supra*, fn 320, paras 54 *et seq.*

Non-Contracting State or also to another Contracting State as in Article 34 (4) JR.

1.3. The ALI/UNIDROIT Principles of Transnational Civil Procedure

229. In 2004 the “Principles of Transnational Civil Procedure” were accepted with unanimous approval by UNIDROIT and ALI. Their purpose is to contribute to a worldwide harmonisation of civil procedure. Bridging the gap between common law and civil law traditions and combining the most attractive attributes of both legal families, the Principles’ aim is to reduce uncertainties and anxieties related to litigation under unfamiliar procedural systems³⁴⁵.

230. The negotiations of the ALI/UNIDROIT Principles were strongly influenced by the advanced development of procedural rules in international and domestic arbitration. It is expected that the ALI/UNIDROIT Principles will in turn influence the further development and practice of arbitration proceedings³⁴⁶. While the Principles were designed to be applied by domestic courts, the Commentary of the preamble of the Principles makes clear that the Principles may apply in international arbitration:

“These Principles are equally applicable to international arbitration, except to the extent of being incompatible with arbitration proceedings, for example, the Principles related to jurisdiction, publicity of proceedings, and appeal”.

231. Constituting an attempt to harmonise domestic codes of civil procedure, the ALI/UNIDROIT Principles are of direct interest to this research. The Principles contain a provision on *res judicata* and this provision could be applied by international commercial arbitral tribunals in their relations with other arbitral tribunals or state courts. Principles 28.2 and 28.3 provide:

“28.2 In applying the rules of claim preclusion, the scope of the claim or claims decided is determined by reference to the claims and defenses in the parties’ pleadings, including amendments, and the court’s decision and reasoned explanation.

28.3 The concept of issue preclusion, as to an issue of fact or

³⁴⁵ STÜRNER, p. 204.

³⁴⁶ STÜRNER, p. 213.

application of law to facts, should be applied only to prevent substantial injustice”.

232. Principle 28.2 emphasises the importance of the parties’ pleadings in determining the scope of the parties’ claims for the purposes of *res judicata*. The intention of the drafters was to give the parties as much freedom as possible to determine the scope of their dispute themselves. The aim was to establish clarity and certainty about the scope of earlier disputes and their significance for subsequent proceedings in the field of international litigation³⁴⁷.

233. Principles 28.2 and 28.3 appear to follow the civil law approach to *res judicata* as applied in continental Europe, providing for limited claim preclusion and excluding, in principle, issue preclusion. Issue preclusion may be invoked only in exceptional cases when the re-litigation of certain factual or legal issues would be clearly abusive³⁴⁸.

234. The accompanying Commentary refers only to the concept of issue preclusion. It states:

“[...] Under Principle 28.3, issue preclusion might be applied when, for example, a party has justifiably relied in its conduct on a determination of an issue of law or fact in a previous proceeding. A broader scope of issue preclusion is recognized in many common-law systems, but the more limited concept in Principle 28.3 is derived from the principle of good faith, as it is referred to in civil-law systems, or estoppel in pais, as the principle is referred to in common-law systems”.

235. The restrictive approach by the ALI/UNIDROIT Principles towards the doctrine of *res judicata* was explained by Stürner:

“This sparing solution takes into account that the judges of a court recognizing a foreign judgment would need to have remarkably good knowledge of foreign law if they had to determine the scope of a claim or issue preclusion according to the common law model. Such knowledge would generally require intensive and expensive expert assessment, which nonetheless may not always be available or reliable. All this speaks well for a more modest solution casting the formal

³⁴⁷ STÜRNER, p. 250.

³⁴⁸ STÜRNER, pp. 250 *et seq.*

claims for relief as a relatively clear and uncomplicated standard”³⁴⁹.

2. PUBLIC INTERNATIONAL LAW

236. According to most scholars the doctrine of *res judicata* constitutes a general principle of law, imported into public international law by virtue of Article 38 (1)(c) of the ICJ Statute³⁵⁰. This view appears to originate in a statement by Lord Phillimore who, during the deliberations of the Advisory Committee of Jurists appointed by the Council of the League of Nations in 1920 to prepare the Statute of the PCIJ, pointed out

“that the general principles [...] were these which were accepted by all nations *in foro domestico*, such as certain principles of procedure, the principle of good faith, and the principle of *res judicata*, etc.”³⁵¹.

237. This opinion was expressly endorsed by Judge Anzilotti in his dissenting opinion in the *Chorzów Factory (Interpretation)* case in 1927:

“[I]t appears to me that if there be a case in which it is legitimate to have recourse, in the absence of conventions and custom, to ‘general principles of law recognized by civilized nations’, mentioned in No. 3 of Article 38 of the Statute, that case is assuredly the present one. Not without reason was the binding effect of *res judicata* expressly mentioned by the Committee of Jurists entrusted with the preparation of a plan for the establishment of a Permanent Court of International Justice, amongst the principles included in the above-mentioned article”³⁵².

³⁴⁹ STÜRNER, p. 251.

³⁵⁰ SCOBIE, p. 299; REINISCH, p. 44; CHENG, p. 336; HANOTIAU, *Complex Arbitrations*, p. 239; MOSLER, p. 522; BROWNLIE, p. 18; LAUTERPACHT, pp. 325 *et seq.*

³⁵¹ Citation reported by LAMMERS, p. 59.

³⁵² PCIJ, *Interpretation of Judgments Nos 7 and 8 (The Chorzów Factory)*, Dissenting Opinion by M. Anzilotti, Ser. A., No. 13, p. 27. See also the advisory opinion of the ICJ of 13 July 1954 on *The Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* where the ICJ referred to the *res judicata* doctrine as a “well-established and generally recognized principle of law” (ICJ Reports 1954, p. 53). In *Waste Management Inc v Mexico (Mexico’s Preliminary Objection)*, the ICSID tribunal stated: “There is no doubt that *res judicata* is a principle of international law, and even a general principle of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice” (ILM, Vol. 41 (2002), pp. 1315 *et seq.*, para. 39). In the *Trail Smelter Arbitration*, the arbitral tribunal stated: “[t]hat the sanctity of *res judicata* attaches to a final decision of an international tribunal is an essential and settled rule of international law” (*Trail Smelter Case*, 11 March 1941, RIAA, Vol. 3, p. 1950). In the *Laguna del Desierto Arbitration* the arbitral tribunal noted: “A judgment having the authority of *res judicata* is judicially binding on the parties to the dispute. This is a fundamental principle of the law of nations repeatedly invoked in the jurisprudence,

238. In recent years some scholars have referred to the doctrine of *res judicata* as a rule of customary international law³⁵³. In any event, either by virtue of customary international law or general principle of law, the doctrine of *res judicata* is a binding rule of public international law³⁵⁴. This means that it can be applied by international courts and tribunals even in the absence of express treaty language, unless the intent to negate the application of the rule is clearly expressed³⁵⁵. The doctrine of *res judicata* has been repeatedly applied by various international courts and tribunals³⁵⁶, including the PCIJ³⁵⁷, the ICJ³⁵⁸, the ECJ³⁵⁹ and several international arbitral tribunals applying international

which regards the authority of *res judicata* as a universal and absolute principle of international law” (*Dispute Concerning the Course of the Frontier Between BP 62 and Mount Fitzroy* (Argentina/Chile), 21 October 1994, ILR, Vol. 113, p. 43).

³⁵³ See SHANY, *Competing Jurisdictions*, p. 245. See also DODGE, pp. 29 *et seq.*

³⁵⁴ SHANY, *Competing Jurisdictions*, p. 246; ILA, *Interim Report*, p. 18.

³⁵⁵ SHANY, *Competing Jurisdictions*, p. 254.

³⁵⁶ See in particular SHANY, *Competing Jurisdictions*, pp. 247 *et seq.*

³⁵⁷ See, e.g., PCIJ, *The “Société Commerciale de Belgique”*, 15 June 1939, Ser. A/B., No. 78, pp. 160 *et seq.*

³⁵⁸ See, e.g., ICJ, *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906* (Honduras v Nicaragua), 18 November 1960, ICJ Reports 1960, pp. 192 *et seq.*; ICJ, *The Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, cited *supra*, fn 352; ICJ, *Request for Interpretation of the Judgment of 11 June 1998 in the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v Nigeria), Preliminary Objections, 25 March 1999, ICJ Reports 1999, p. 39; ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v Bahrain), Merits, Dissenting Opinion by Judge Torres Bernárdez, 16 March 2001, ICJ Reports 2001, para. 303; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro), 26 February 2007, available at www.icj-cij.org.

³⁵⁹ The ECJ has relied upon the doctrine of *res judicata* to declare actions inadmissible in cases that have already been decided in previous judgments although the ECJ’s Rules of Procedure do not expressly refer to the doctrine of *res judicata*. See, e.g., ECJ, *Mrs Emilia Gualco (née Barge) v High Authority of the European Coal and Steel Community*, Case 14/64, 1965 ECR, p. 51; ECJ, *Hoogovens Groep v Commission*, Cases 172 and 226/83, 1985 ECR, p. 2831; ECJ, *France v Parliament*, Cases 358/85 and 51/86, 1988 ECR, p. 4846, 4849-50. See also ECJ, *Jean Reynier and Piero Erba v Commission of the European Economic Community*, Cases 79/63 and 82/63, 9 July 1964, 1964 ECR, p. 00259 (“The force of *res judicata* prevents rights confirmed by a judgment of the Court from being disputed anew. Since the Community is a single entity, it is inconceivable that judgment of the court which has the force of *res judicata* with regard to an institution - in this case the Commission - should not have the same force with regard to the Community as a whole”); EJC, *Rosemarie Kapsferer v Schlank & Schick, GMBH*, Case C-243/04, 16 March 2006, 2006 ECR, p. I-2585, para. 20 (“In that regard, attention should be drawn to the importance, both for the Community legal order and national legal systems, of the principle of *res judicata*. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question”); ECJ, *Gerhard Köbler v Republik Österreich*, Case C-224/01, 30 September 2003, 2003 ECR, p. I-10239, para. 38. On the scope of the *res judicata* effect of ECJ judgments see, e.g., ECJ, *Italian Republic v Commission of the European Communities*, Case C-281/89, 19 February 1991, 1991 ECR, p. I-00347, para. 14 (“It must be observed that the principle of *res judicata* extends only to the matters of fact and law actually or necessarily settled by a judicial decision”). On the requirements for the application of the *res judicata* doctrine see, e.g., ECJ, *France v Monsanto Company and Commission of the European Communities*, Case 248/99P, 8 January 2002, 2002 ECR, p. I-1, para. 37 (“the objection of *res judicata* presupposes that the action alleged to be inadmissible and the action culminating in the decision having the force of *res judicata* are between the same parties,

law³⁶⁰.

239. There is an immediate foundation for the doctrine of *res judicata* in the ICJ Statute. Articles 59 and 60 provide:

“Article 59

The decision of the Court has no binding force except between the parties and in respect of that particular case.

Article 60

The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party”.

240. Articles 59 and 60 are supplemented by Article 94 (2) of the Rules of the ICJ according to which

“[t]he judgment shall be read at a public sitting of the Court and shall become binding on the parties on the day of the reading”.

241. These provisions cover the generally acknowledged characteristics and effects of a *res judicata*. Article 59 expresses the relative authority of a judicial decision, extending only to the parties to the dispute. Article 60 determines the force or formal value of the *res judicata*, *i.e.* the particular effectiveness attached to it as definitive and not subject to review³⁶¹.

242. Other international instruments, such as the Statutes of the ITLOS or the ECHR, also contain similar provisions on *res judicata*³⁶².

have the same subject matter and are based on the same cause of action”). See also NOURISSAT; REILING, p. 136; LASOK, pp. 219 *et seq.*

³⁶⁰ See, *e.g.*, PCA, *Pious Fund of the California* (United States v Mexico), 14 October 1902, The Hague Court Reports, p. 5; PCA, *Trail Smelter Case*, cited *supra*, fn 352; PCA, *Laguna del Desierto Arbitration*, cited *supra*, fn 352; *Waste Management Inc v Mexico (Mexico’s Preliminary Objection)*, cited *supra*, fn 352; *Amco Asia Corp v Indonesia (Resubmission: Jurisdiction)*, cited *supra*, fn 352.

³⁶¹ COUVREUR, p. 100; ROSENNE, *Vol. 3*, para. III.391, p. 1599.

³⁶² Article 33 of the ITLOS Statute: “(1) The decision of the Tribunal is final and shall be complied with by all the parties to the dispute. (2) The decision shall have no binding force except between the parties in respect of that particular dispute. (3) In the event of dispute as to the meaning or scope of the decision, the Tribunal shall construe it upon the request of any party”. Article 35 (2)(b) of the ECHR (“the

243. The *res judicata* provisions contained in international instruments have been interpreted and supplemented by international courts and tribunals drawing on general international law³⁶³.

244. The public international law doctrine of *res judicata* is generally similar to the doctrine in domestic laws. Therefore, the following analysis will begin by introducing the constituent elements of a *res judicata* in public international law (2.1.), and then examine the effects of a *res judicata* (2.2.). Finally, the requirements that must be met for the *res judicata* doctrine to apply will be determined (2.3.). The analysis' main focus will be on the systems of the PCIJ and the ICJ³⁶⁴.

2.1. Constituent Elements of a *Res Judicata*

245. A *res judicata* in public international law is a final judgment rendered by an international court or tribunal of judicial nature and of competent jurisdiction.

A judgment

246. Article 60 of the ICJ Statute provides that judgments of the ICJ are final and without appeal. A judgment within the meaning of Article 60 is a decision that brings the dispute to an end. It is the last formal step in the resolution of the dispute before the ICJ³⁶⁵.

247. By contrast, Article 59 of the ICJ Statute uses the word “decision” instead of

[European] Court [of Human Rights] shall not deal with any application submitted under Article 34 that [...] is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure or international investigation or settlement and contains no relevant new information”); Article 46 (1) of the ECHR: “The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties” (on the *res judicata* effect of judgments of the European Court of Human Rights see, e.g., FRICÉRO). For further examples see BROWN, p. 154, fn 4.

³⁶³ As regards Articles 59 and 60 of the ICJ Statute, see SCOBBIÉ, p. 304. See also the dissenting opinion of Judge Anzilotti in the *Chorzów Factory (Interpretation)* case, cited *supra*, fn 352. Judge Anzilotti clearly based his interpretation of Articles 59 and 60 on general principles, referring to “a well-known principle” (p. 25) and “a generally accepted rule which is derived from the very conception of *res judicata*” (p. 26). Judge Anzilotti further expressly stated that he “relied upon principles obtaining in civil procedure” as Article 59 “clearly refers to a traditional and generally accepted theory in regard to the material limits of *res judicata*” (p. 27).

³⁶⁴ For cases in which other permanent international courts and tribunals addressed the issue of *res judicata*, see SHANY, *Competing Jurisdictions*, pp. 251 *et seq.*

³⁶⁵ ROSENNE, *Vol. 3*, para. III.391, p. 1598.

“judgment”. These words have the same meaning for the purposes of *res judicata*³⁶⁶; “judgments” and “decisions” within the meaning of Articles 59 and 60 may become *res judicata*.

248. Any judgment of the ICJ, independently of its nature, may become *res judicata*³⁶⁷. This includes purely declaratory judgments³⁶⁸.

249. By contrast, orders or advisory opinions may not become *res judicata*. Article 48 of the ICJ Statute gives the Court the general power to make orders for the conduct of the case³⁶⁹. In the *Free Zones* case, the PCIJ held:

“[...] in contradistinction to judgments [...], orders made by the Court [...] have no ‘binding’ force (Article 59 of the Statute) or ‘final’ effect (Article 60 of the Statute) in deciding the dispute brought by the Parties before the Court”³⁷⁰.

250. The PCIJ’s ruling in the *Free Zones* case must however be limited to interlocutory decisions other than provisional measures rendered pursuant to Article 41 of the ICJ Statute. This means that only interlocutory decisions made to regulate the conduct of the parties during the proceedings lack binding force and final effect.

251. In the *LaGrand* judgment the ICJ unambiguously stated that “orders on provisional measures under Article 41 have binding effect”³⁷¹. The ICJ President Gilbert Guillaume corroborated the Court’s ruling in his speech to the General Assembly when presenting the ICJ report 2000/2001:

³⁶⁶ ROSENNE, *Vol. 3*, para. III.391, p. 1603.

³⁶⁷ BRANT, p. 68.

³⁶⁸ See PCIJ, *Case Concerning Certain German Interests in Polish Upper Silesia (the Merits)*, Ser. A, No. 7, p. 19. See also PCIJ, *Interpretation of Judgments Nos 7 and 8 (The Chorzów Factory)*, cited *supra*, fn 352, p. 20 (“[...] the intention of [a declaratory judgment] is to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing there from are concerned”); ICJ, *Case concerning the Northern Cameroons* (Cameroon v. United Kingdom), Preliminary Objections, 2 December 1963, Dissenting Opinion of Judge Ben a Don, ICJ Reports 1963, p. 196 (“[A declaratory judgment] puts a final end to the dispute with force of *res judicata*; it is binding on the Parties, which can never again raise the same question before the Court”).

³⁶⁹ Article 48 ICJ Statute provides: “The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence”.

³⁷⁰ PCIJ, *Case of the Free Zones of Upper Savoy and the District of Gex*, 1929 PCIJ, Ser. A, No. 22, p. 13.

³⁷¹ ICJ, *LaGrand Case* (Germany v United States of America), 27 June 2001, ICJ Reports 2001, para. 109.

“[F]or the first time in its history, the Court took the opportunity to give a clear ruling on the effect of provisional measures [...] pursuant to Article 41 of its Statute. [...] Thus there is no longer any room for doubt: the provisional measures indicated as a matter of urgency by the Court for the purpose of safeguarding the rights of the parties are binding on them”³⁷².

252. Advisory opinions do not qualify as *res judicata*³⁷³. However, they have been invoked in subsequent cases where the same point has arisen for decision³⁷⁴. In the *Certain German Interests in Polish Upper Silesia (Merits)* case³⁷⁵ the PCIJ had to consider the weight to be given to the advisory opinion concerning *German Settlers in Poland*³⁷⁶. In the preliminary objections phase of the *South West Africa* cases³⁷⁷ the ICJ had to consider the effect of the advisory opinion concerning the *International Status of South West Africa*³⁷⁸.

A judicial court or tribunal

253. To qualify as a *res judicata* a judgment must be rendered by a judicial court or tribunal. This follows from the ICJ’s advisory opinion on the *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*. The ICJ had to decide whether the UN General Assembly is bound by an award of compensation made by the UN Administrative Tribunal. The ICJ held that because the functions of the UN Administrative Tribunal were of judicial and not advisory nature, its judgments were *res judicata*³⁷⁹.

³⁷² Speech by President Gilbert Guillaume, 30 October 2001, A/56/PV.32, pp. 6 *et seq.*

³⁷³ ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, 30 March 1950, ICJ Reports 1950, p. 71 (“The Court’s reply is only of an advisory character: as such, it has no binding force”); BRANT, pp. 41 and 69; SCHULTE, pp. 14 *et seq.*

³⁷⁴ SCOBIE, p. 312. See also GRISEL, pp. 143 *et seq.*

³⁷⁵ Cited *supra*, fn 368.

³⁷⁶ *Certain Questions Relating to Settlers of German Origin in the Territory ceded by Germany to Poland*, Advisory Opinion, 10 September 1923, PCIJ, Ser. B, No. 6.

³⁷⁷ ICJ, *South West Africa Cases* (Ethiopia and Liberia v South Africa), Preliminary Objections, 21 December 1962, 1962 ICJ Reports, p. 319.

³⁷⁸ ICJ, *International Status of South West Africa*, Advisory Opinion, 11 July 1950, 1950 ICJ Reports, p. 128.

³⁷⁹ ICJ, Advisory Opinion on *The Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, cited *supra*, fn 368, p. 53 (“According to a well-established and generally recognized principle of law, a judgment rendered by such a judicial body is *res judicata* and has binding force between the parties to the dispute”).

A tribunal of competent jurisdiction

254. Only a judgment rendered by a competent tribunal may become *res judicata*³⁸⁰, as a lack or excess of competence are causes of nullity of a final judgment³⁸¹.

255. International courts and tribunals generally have jurisdiction only over matters submitted to them for decision by the parties³⁸². In the advisory opinion concerning the *Polish Postal Service in Danzig*, the PCIJ had to decide whether there was already in force between the parties a binding decision that restricted the Polish postal service to operations within its premises located at “Heveliusplatz” and confined the use of the Polish postal service to Polish authorities and offices. The PCIJ held that there was no such prior binding decision because the issues in question had not been submitted to the High Commissioner, who had rendered the prior decision, and the instruments on which the jurisdiction of the High Commissioner was based gave him no authority to render a final and binding decision on matters not submitted to him³⁸³.

A final decision

256. To become *res judicata* a judgment must be final and without appeal³⁸⁴. The matter must be “finally disposed of for good”³⁸⁵. The judgment becomes *res judicata* on the day of the public reading³⁸⁶.

A judgment on the merits?

257. The *res judicata* effect of a judgment is not strictly limited to judgments which finally determine the merits of a claim after proceedings on the substantive issues of the dispute. However, a judgment that does not deal with the merits of the claim does not become *res judicata* as to those merits³⁸⁷. By contrast, if a tribunal, when deciding on its

³⁸⁰ CHENG, p. 337.

³⁸¹ CHENG, p. 357.

³⁸² BRANT, pp. 130 and 133.

³⁸³ PCIJ, *Polish Postal Service in Danzig*, Advisory Opinion, 16 May 1925, Ser. B, No. 11, p. 26.

³⁸⁴ Article 60 ICJ Statute.

³⁸⁵ ICJ, *Barcelona Traction Light and Power Company, Ltd.* (New Application) (Belgium v Spain)(Preliminary Objections), 1964 ICJ Reports, p. 20.

³⁸⁶ Article 94 (2) ICJ Rules.

³⁸⁷ In the *Trail Smelter Arbitration* the arbitral tribunal held: “[...] a decision merely denying jurisdiction can never constitute *res judicata* as regards the merits of the case at issue” (cited *supra*, fn 352, p. 1953).

jurisdiction, is required to determine an issue touching on the merits, the tribunal's determination of this issue will be held to be *res judicata* as between the parties in ensuing proceedings on the merits³⁸⁸.

258. The decision by which an international court or tribunal accepts its jurisdiction is final and binding and acquires the force of *res judicata*³⁸⁹. This was decided by the ICJ in the *Corfu Channel (Compensation)* case where it held:

“[T]he Albanian Government disputed the jurisdiction of the Court with regard to the assessment of damages. The Court may confine itself to stating that this jurisdiction was established by its Judgment of April 9th, 1949; that, in accordance with the Statute (Article 60) [...] that Judgment is final and without appeal, and that therefore the matter is *res judicata*”³⁹⁰.

259. This was confirmed by the ICJ in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro):

“The Court will however observe that the decision on questions of jurisdiction, pursuant to Article 36, paragraph 6, of the Statute, is given by judgment, and Article 60 of the Statute provides that ‘[t]he judgment is final and without appeal’, without distinguishing between judgments on jurisdiction and admissibility, and judgments on the merits”³⁹¹.

260. A decision by which an international court or tribunal merely denies its jurisdiction does not become *res judicata* in the sense that the same dispute may be presented before another tribunal which may have jurisdiction³⁹².

The scope of res judicata

261. The question arises as to whether the *res judicata* effect of a judgment in public

³⁸⁸ HANOTIAU, *Complex Arbitrations*, para. 520.

³⁸⁹ ROSENNE, *Vol. 2*, para. II.214, p. 804.

³⁹⁰ ICJ, *The Corfu Channel Case (Compensation)* (United Kingdom of Great Britain and Northern Ireland v People's Republic of Albania), 15 December 1949, 1949 ICJ Reports, p. 248.

³⁹¹ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro), 26 February 2007, para. 117, pp. 44 *et seq.*

³⁹² CHENG, pp. 337 *et seq.*

international law extends only to its dispositif or also to some of its reasons. In *Amco Asia Corp v Indonesia (Resubmission: Jurisdiction)*, the tribunal held:

“It is by no means clear that the basic trend in international law is to accept reasoning [...] as part of what constitutes *res judicata*.

[...]

So far as international law practice is concerned, authors have not been able to show a clear trend towards the acceptance of reasons as *res judicata*”³⁹³.

262. In his dissenting opinion in the *Chorzów Factory (Interpretation)* case Judge Anzilotti contended that only the dispositif of a judgment becomes *res judicata*. Reasons may be relied upon only to interpret the dispositif and to specify the meaning and scope of the court’s decision:

“[I]t is certain that the binding effect attaches only to the operative part of the judgment and not to the statement of reasons.

The grounds of a judgment are simply logical arguments, the aim of which is to lead up to the formulation of what the law is in the case in question. And for this purpose there is no need to distinguish between essential and non-essential grounds, a more or less arbitrary distinction which rests on no solid basis and which can only be regarded as an inaccurate way of expressing the different degree of importance which the various grounds of a judgment may possess for the interpretation of its operative part.

When I say that only the terms of a judgment are binding, I do not mean that only what is actually written in the operative part constitutes the Court’s decision. On the contrary, it is certain that it is almost always necessary to refer to the statement of reasons to understand clearly the operative part and above all to ascertain the *causa petendi*. But, at all events, it is the operative part which contains the Court’s binding decision and which, consequently, may form the subject of a request for an interpretation”³⁹⁴.

³⁹³ *Amco Asia Corp v Indonesia (Resubmission: Jurisdiction)*, ILM, Vol. 27 (1988), pp. 1281 *et seq.*, paras 32 and 38.

³⁹⁴ PCIJ, *Interpretation of Judgments Nos 7 and 8 (The Chorzów Factory)*, Dissenting Opinion by M. Anzilotti,

263. However, in recent years a wider approach appears to be preferred, attributing *res judicata* effects to reasons which constitute the necessary foundation of the dispositif³⁹⁵. In the *Channel Arbitration* between the United Kingdom and France, the PCA held:

“The Court of Arbitration considered it to be well settled that in international proceedings the authority of *res judicata*, that is the binding force of the decision, attaches in principle only to the provisions of its *dispositif* and not to its reasoning. In the opinion of the Court, it is equally clear that, having regard to the close links that exist between the reasoning of a decision and the provisions of its *dispositif*, recourse may in principle be had to the reasoning in order to elucidate the meaning and scope of the *dispositif*. [...] Furthermore, if findings in the reasoning constitute a condition essential to the decision in the *dispositif*, these findings are to be considered as included

cited *supra*, fn 352, p. 24.

³⁹⁵ See BOWETT, pp. 577 *et seq.*; EL OUALI, pp. 74 *et seq.*; ILA, *Interim Report* p. 22; CHENG, pp. 348 *et seq.*; SCHREUER/REINISCH, paras 67 *et seq.*; BRANT, p. 172; SHANY, *Competing Jurisdictions*, p. 28 with reference to ECJ, *Italian Republic v Commission of the European Communities*, Case C-281/89, 19 February 1991, 1991, ECR, p. I-347, para. 14; ECJ, *Lenz v Commission*, Case C-277/95, 28 November 1996, 1996 ECR, p. I-6109, 6125; ECJ, *Limburgse Vinyl Maatschappij NV v Commission*, Cases T-305-07, 313-16, 318, 325, 328-29 and 335/94, 1999 ECR, p. II-931, 972; ECJ, *Asteris v Commission*, Cases 97, 99, 193 and 215/86, 1988 ECR, p. 2181, 2208. See also ICJ, *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Application by Honduras for Permission to Intervene, 4 May 2011, paras 66-70. This case involved a dispute between Nicaragua and Colombia consisting of “a group of related legal issues subsisting” between the two States “concerning title to territory and maritime delimitation” in the western Caribbean. On 10 June 2010, Honduras filed an application for permission to intervene in the case. The question arose whether Honduras had an interest of a legal nature which could be affected by the Court’s decision in the main proceedings between Nicaragua and Colombia. To answer this question, the Court had to determine whether and to what extent the prior “2007 Judgment” rendered by the ICJ in the *Territorial and Maritime Dispute between Nicaragua and Honduras* had already finally determined certain rights of Honduras with respect to the “delimitation area” in the Caribbean Sea now in dispute between Nicaragua and Colombia. According to Nicaragua, the *res judicata* effect of the 2007 Judgment prevented Honduras from intervening in the proceedings between Nicaragua and Colombia. In particular, Honduras was precluded from reopening, under the cover of the intervention, delimitation issues already decided by the 2007 Judgment. Honduras argued that the 2007 Judgment had not finally determined the entire Caribbean Sea boundary between Nicaragua and Honduras and there still existed some issues to be resolved with respect to the respective rights of Honduras, Colombia and Nicaragua in the area. In particular, the determinations made in the reasoning of the 2007 Judgment were not covered by that Judgment’s *res judicata* effect, which attaches only to its dispositif. Even though the ICJ does not state so in express terms, it appears to suggest that reasons which constitute “an essential step leading to the *dispositif* of [the] judgment” are covered by the judgment’s *res judicata* effect. The ICJ confirmed that a judgment’s operative part “indisputably has the force of *res judicata*”. It then added that the reasoning in question in the 2007 Judgment “was an essential step leading to the *dispositif* of that Judgment” and “[w]ithout such reasoning, it may be difficult to understand why the Court did not fix an endpoint in its decision. With this reasoning, the decision made by the Court in its 2007 Judgment leaves no room for any alternative interpretation”. See also ICSID, *RSM Production Corporation and others v. Grenada*, cited *infra*, fn 408, para. 7.1.2., where the tribunal held that the doctrine of collateral estoppel is now established as a general principle of law applicable by international courts and tribunals.

amongst the points settled with binding force in the decision”³⁹⁶.

264. While the PCA first affirmed the rule that *res judicata* effects attach only to a decision’s dispositif, it clearly conferred *res judicata* effect to reasons which are essential to the decision’s dispositif. It must be added, however, that the dispositif in question was essentially a list of coordinates defining the boundary. The dispositif merely spelt out the principles of law which constituted the true *res judicata* and which were contained in the reasoning of the PCA³⁹⁷.

265. In the *Channel Arbitration* the PCA also held that in case of contradiction between reasons constituting the necessary foundation of the dispositif and the dispositif itself, the statement that expresses best the arbitral tribunal’s intention must prevail³⁹⁸. This further confirms the allegation that reasons which are the necessary foundation of a decision may have *res judicata* effect³⁹⁹.

266. The Iran-US Claims Tribunal seems to have gone even further, holding that a decision’s reasons have *res judicata* effect not only where they form the necessary foundation of the dispositif, but also where “those reasons are relevant to the actual decision on the question at issue”⁴⁰⁰.

2.2. Effects of a *Res Judicata*

267. In the *Société Commerciale de Belgique* case the PCIJ said :

“Recognition of an award as *res judicata* means nothing else than recognition of the fact that the terms of that award are

³⁹⁶ PCA, *Case Concerning the Delimitation of the Continental Shelf Between the United Kingdom of Great Britain and Northern Ireland and the French Republic (Interpretation of the Decision of 30 June 1977)*, 14 March 1978, RIAA, Vol. 18, para. 28, p. 295. This is also in line with the decision of the Franco-Venezuelan Mixed Claims Commission (1902) in *Company General of the Orinoco Case*, 10 RIAA, p. 276 (“Every matter and point distinctly in issue in said cause, and which was directly based upon and determined in said decree, and which was its ground and basis, is concluded by the judgment”).

³⁹⁷ BOWETT, p. 578.

³⁹⁸ PCA, *Case Concerning the Delimitation of the Continental Shelf Between the United Kingdom of Great Britain and Northern Ireland and the French Republic (Interpretation of the Decision of 30 June 1977)*, cited *supra*, fn 396, para. 36, p. 299.

³⁹⁹ See ZOLLER, p. 344 ; BRANT, pp. 129 and 175.

⁴⁰⁰ Iran-US Claims Tribunal, Partial Award No. 601-A3/A8/A9/A14/B61-FT Full Tribunal, 17 July 2009, para. 115.

definitive and obligatory”⁴⁰¹.

268. From this it has been inferred that a *res judicata* in public international law has both a negative and a positive effect. The negative effect is that which is *res judicata* is definitive. The judgment is final and the same matter may not be disputed again between the same parties⁴⁰². The positive effect is that which is *res judicata* is obligatory. The judgment is binding upon the parties and they must execute it as it stands⁴⁰³.

269. The precise preclusive nature of decisions rendered by international courts and tribunals is not clear⁴⁰⁴. It is accepted that the public international law doctrine of *res judicata* applies only with regard to issues that were actually determined by the international court or tribunal. No preclusive effect attaches to issues raised in the proceedings but glossed over by the decision⁴⁰⁵. It is also clear that the public international law doctrine of *res judicata* prevents the re-litigation of claims. It is unclear, however, whether the doctrine also prevents the relitigation of issues. International courts and tribunals ordinarily do not deal with issue preclusion explicitly, using only the terminology of *res judicata*⁴⁰⁶.

270. However, it appears now widely accepted that findings contained in the reasoning and constituting the necessary foundation of a judgment have *res judicata* effects⁴⁰⁷. It may therefore be argued that issue preclusion exists in public international law to the extent that the *res judicata* effect of a judgment includes reasons⁴⁰⁸.

⁴⁰¹ See PCIJ, *Société Commerciale de Belgique*, 15 June 1939, cited *supra*, fn 357, p. 175.

⁴⁰² CHENG, p. 337; HANOTIAU, *Complex Arbitrations*, para. 516.

⁴⁰³ PCIJ, *Société Commerciale de Belgique*, 15 June 1939, cited *supra*, fn 357, p. 176. See also REINISCH, p. 45.

⁴⁰⁴ SHANY, *Competing Jurisdictions*, p. 253.

⁴⁰⁵ SHANY, *Competing Jurisdictions*, pp. 27 *et seq.*

⁴⁰⁶ According to LOWE, while only using the terminology of *res judicata*, it seems that international courts and tribunals also apply issue preclusion principles to final determinations of fact and law by previous tribunals (p. 32).

⁴⁰⁷ See *supra*, paras 261 *et seq.*

⁴⁰⁸ In December 2010, the ICSID Tribunal in *RSM Production Corporation and others v Grenada* held that “[i]t is also not disputed that the doctrine of collateral estoppel is now well established as a general principle of law applicable in the international courts and tribunals such as this one” (ICSID Case No. ARB/10/6, Award, 10 December 2010, para. 7.1.2.). It is difficult to subscribe to this statement. In support of this statement, the ICSID Tribunal referred to paragraph 30 of *Amco Asia Corp. v Republic of Indonesia (Resubmission: Jurisdiction)*, where the tribunal cited the following passage from the *Company General of the Orinoco Case*: “The general principle announced in numerous cases is that a right, question or fact *distinctly put in issue and distinctly determined* by a court of competent jurisdiction as a ground for recovery, cannot be

271. Finally, according to ILA, international law recognises a doctrine of abuse of process, but it is extremely rarely applied⁴⁰⁹.

2.3. Requirements for the Application of the Doctrine of *Res Judicata*

272. In public international law the doctrine of *res judicata* applies only where there is identity of parties and questions at issue⁴¹⁰. The requirement of identity of the question at issue has sometimes been subdivided into the object and the cause of the claim⁴¹¹. In the *Chorzów Factory (Interpretation)* case, Judge Anzilotti, interpreting Article 59 of the ICJ Statute, said:

“[W]e have here the three traditional elements for identification, *persona*, *petitum*, *causa petenti*, for it is clear that ‘that particular case’ (*le cas qui a été décidé*) covers both the object and the grounds of the claim”⁴¹².

273. The tribunal in the *Trail Smelter Arbitration* held:

“There is no doubt that in the present case, there is *res judicata*. The three traditional elements for identification: parties, object and cause are the same”⁴¹³.

274. Accordingly, the application of the *res judicata* doctrine requires the triple identity of parties, object and cause⁴¹⁴. In addition, both proceedings must be conducted before

disputed” (Hague Court Reports (1916), 226; RIAA, Vol. X, p. 276). The French-Venezuelan Commission itself quoted this passage from the US Supreme Court’s Decision in *Southern Pacific Railroad Co. v US* (168 Sup. Ct. Rep., 1) (also referred to by the ICSID Tribunal). However, as was seen above, in paragraphs 32 and 38 of *Amco Asia Corp. v Republic of Indonesia (Resubmission: Jurisdiction)* the tribunal expressly held that it is by no means an accepted principle of international law that the *res judicata* effect of a judgment extends to its reasons (see *supra*, para. 261). See also GALLAGHER, para. 17-15.

⁴⁰⁹ ILA, *Interim Report*, p. 22.

⁴¹⁰ *In the Matter of the S. S. Newchwang* (UK v US), Claim No. 21, 9 December 1921, AJIL (1922), Vol. 16, p. 324 (“It is a well established rule of law that the doctrine of *res judicata* applies only where there is identity of the parties and of the question at issue”). In the *Pious Fund* case, the PCA applied the doctrine of *res judicata* because there was “not only identity of parties to the suit, but also identity subject matter” (PCA, *Pious Fund of the California* (United States v Mexico), 14 October 1902, cited *supra*, fn 360, p. 5). See also ICSID, *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, Decision on Jurisdiction, 14 November 2005, para. 72.

⁴¹¹ Instead of these two sub-categories, Shany suggests that a clearer description would be that “identity of issues” is met if the competing claims address the same fact pattern (transaction) and the same legal claims (SHANY, *Competing Jurisdictions*, p. 25).

⁴¹² PCIJ, *Interpretation of Judgments Nos 7 and 8 (The Chorzów Factory)*, Dissenting Opinion by M. Anzilotti, cited *supra*, fn 352, p. 23.

⁴¹³ *Trail Smelter Case*, cited *supra*, fn 352, p. 1952.

⁴¹⁴ BROWN, p. 155.

international courts or tribunals: the doctrine of *res judicata* applies only between courts and tribunals belonging to the same legal order⁴¹⁵.

Identity of parties

275. Article 59 of the ICJ Statute expressly provides that “[t]he decision of the Court has no binding force except between the parties [...]”⁴¹⁶. Likewise, the identity of parties requirement is clearly stated in almost all of the international precedents⁴¹⁷.

276. The question whether there is identity of parties ultimately depends on the degree of formality applied in ascertaining “identity”⁴¹⁸. While some international courts and tribunals have applied a strict “formal identity” standard⁴¹⁹, others have applied the more flexible standard of “essentially the same parties”⁴²⁰.

277. The identity of parties requirement may lead to difficult questions in cases of arbitrations involving a state on one side and a private party on the other side. The question may arise whether the holding company of an investor operating through various subsidiaries is identical with its other corporate manifestations. It may be questioned whether a legally separate entity of a corporate group may be regarded as an identical party or at least sufficiently closely related for the application of the *res judicata* doctrine⁴²¹.

278. In the *CME v Czech Republic* case, the arbitral tribunal had to decide whether an earlier award rendered between Ronald Lauder and the Czech Republic constituted a *res*

⁴¹⁵ With regard to the requirements for the application of the issue preclusion doctrine the tribunal in *RSM Production Corporation and others v Grenada* held that “a finding concerning a right, question or fact may not be re-litigated (and, thus, is binding on a subsequent tribunal), if, in a prior proceeding: (a) it was distinctly put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolving the claims before that court or tribunal” (ICSID, *RSM Production Corporation and others v. Grenada*, cited *supra*, fn 407, para. 7.1.1). While the parties must be identical in both proceedings, the cause and object may be different.

⁴¹⁶ See also Article 33 (2) ITLOS Statute; EL OUALI, p. 83 with reference to other international instruments.

⁴¹⁷ CHENG, p. 340; REINISCH, p. 55.

⁴¹⁸ SHANY, *Regulating Jurisdictional Relations*, p. 133.

⁴¹⁹ See, e.g., *CME v Czech Republic*, *infra* paras 278 *et seq.*

⁴²⁰ See, e.g., ECHR, *Cereceda Martin v Spain*, Case 16358/90, 12 October 1992, DR Vol. 73, pp. 120 *et seq.* For more detail on the identity of parties requirement in public international law, see SHANY, *Regulating Jurisdictional Relations*, pp. 133 *et seq.*; SHANY, *Similarity in the Eye of the Beholder*, pp. 128 *et seq.*

⁴²¹ REINISCH, pp. 55 *et seq.*

judicata in the dispute before it. The tribunal held that this was not the case, *inter alia*, because the claimants in each arbitration were different, even though Mr Lauder was the controlling shareholder of CME. The tribunal stated in relevant terms:

“Only in exceptional cases, in particular in competition law, have tribunals or law courts accepted a concept of a ‘single economic entity’, which allows discounting of the separate legal existences of the shareholder and the company, mostly, to allow the joining of a parent of a subsidiary to an arbitration. Also a ‘company group’ theory is not generally accepted in international arbitration (although promoted by prominent authorities) and there are no precedents of which this Tribunal is aware for its general acceptance. In this arbitration the situation is even less compelling. Mr. Lauder, although apparently controlling CME Media Ltd., the Claimant’s ultimate parent company, is not the majority shareholder of the company and the cause of action in each proceeding was based on different bilateral investment treaties. This conclusion accords with established international law”⁴²².

279. The tribunal in the *CME v Czech Republic* case applied a formalistic approach, relying on the formal distinction between the controlling shareholder and the controlled company. The same approach was followed by the Svea Court of Appeal, the Swedish court where the partial award rendered in the same case on 13 September 2001 was challenged⁴²³.

280. ICSID tribunals have on occasions followed an economic approach with regard to jurisdiction. They take a “realistic attitude”⁴²⁴ when identifying the party on the investor’s side. They look for the actual foreign investor and are unimpressed by the fact that the consent agreement only names a subsidiary⁴²⁵. It has been argued that if such an economic approach is accepted for jurisdictional purposes it should also apply for purposes of *res judicata* to avoid that individual companies of a corporate group (constituting a single economic entity) avail themselves of the possibility to endlessly re-

⁴²² UNCITRAL, *CME Czech Republic BV v The Czech Republic*, Final Award, 14 March 2003, paras 435 *et seq.*

⁴²³ Svea Court of Appeal, 15 May 2003, *The Czech Republic v CME Czech Republic BV*, Case No. T 8735-01, pp. 97 *et seq.* (“Identity between a minority shareholder, albeit a controlling one, and the actual company cannot, in the Court of Appeal’s opinion, be deemed to exist in a case such as the instant one. This assessment would apply even if one were to allow a broad determination of the concept of identity”).

⁴²⁴ SCHREUER, *ad Article 25*, para. 329.

⁴²⁵ *Ibid*; REINISCH, pp. 57 *et seq.*

litigate the same dispute under the disguise of separate legal identities⁴²⁶.

Identity of object

281. The identity of objects requirement relates to the remedies sought. The same type of relief must be sought in both proceedings⁴²⁷.

282. International courts and tribunals have sometimes applied the broader standard of substantial identity of objects. In the *Chen (No. 2)* case, the ILOAT held that a claim relating to premature retirement was precluded by the *res judicata* doctrine because in an earlier judgment the tribunal had dismissed the claimant's claim against the refusal of the WHO to renew his contract and the subsequent application was substantially the same⁴²⁸.

283. A broad approach has also sometimes been applied by arbitral tribunals to avoid "claim splitting"⁴²⁹. In these cases claimants were barred from raising closely related claims in subsequent proceedings that they could have raised in a prior proceeding⁴³⁰.

284. In the *Delgado case* before the US-Spanish Claims Commission, a first claim was brought for damages against Spain for seizure of property in Cuba. This claim was denied by an umpire in 1876. Subsequently, another claim was brought by the same claimant for the value of the property seized. The umpire dismissed the claim on grounds of *res judicata* holding:

“[e]ven if the claimant did not at the time of the former case ask indemnity of the commission for the value of the lands, the

⁴²⁶ REINISCH, p. 59; ILA, *Interim Report*, p. 21.

⁴²⁷ REINISCH, p. 62; BRANT, p. 117. See also ICSID, *Helnan International Hotels A/S v The Arab Republic of Egypt*, Award of 3 July 2008, paras 128-130. In this case, the tribunal compared the claimant's prayers for relief submitted in the "Cairo Arbitration" and the ICSID arbitration. It then held: "The comparison of the respective claims and counterclaims in each of the proceedings shows that even if the subject matter of the disputes is the same, i.e. the Management Contract, the relief sought is not identical, although it is globally aiming at the same result: allowing HELNAN to continue to be in charge of the management of the Shepard Hotel, obliging the owner of the Hotel to renovate it and obtaining compensation for alleged damages".

⁴²⁸ ILOAT, *Chen (No. 2)*, Judgment No. 547 (1983)(reported by REINISCH, p. 64).

⁴²⁹ See REINISCH, pp. 62 *et seq.*

⁴³⁰ DODGE, p. 366.

claimant had the same power to do so as other claimants in other cases where it has been done, and he can not have relief by a new claim before a new Umpire”⁴³¹.

285. In the *Machado* case, the first claim was brought for damages arising from the seizure of a house. In the second claim, the restoration of the house, as well as rent and damages for its detention, were claimed. The umpire before whom the second claim was brought dismissed it regarding both claims as identical:

“that the questions whether this claim No. 129 is a new one, or the same as No. 3 does not depend upon whether the items included be the same in both cases, but that the test is whether both claims are founded on the same injury, that the only injury on which claim No. 129 is founded is the seizure of a certain house; that this same injury was alleged as one of the foundations for claim No. 3, and that in consequence claim No. 129, as being part of an old claim, can not be presented as a new claim under a new number”⁴³².

286. In both cases the US-Spanish Claims Commission followed a broad approach regarding the identity of object. The Commission regarded the entire claim as settled by the first proceedings without regard as to whether the various and separate items contained in the claim have all been presented or not⁴³³.

Identity of cause

287. The cause is the legal foundation relied upon by the claimant in support of a claim. There is identity of cause if the same rights and legal arguments are relied upon in both proceedings⁴³⁴. To determine the cause of a claim one has to ask “why” the claimant is asking for the relief sought⁴³⁵.

288. In theory, proceedings brought under formally different legal grounds are considered to be based on different causes for the purposes of *res judicata*⁴³⁶. Accordingly, *res judicata* would not apply where the same claimant seeks the same relief

⁴³¹ *Delgado Case* (1881), reported in BASSETT MOORE, p. 2199.

⁴³² *Machado Case* (1880), reported in BASSETT MOORE, p. 2194.

⁴³³ CHENG, p. 344.

⁴³⁴ REINISCH, p. 62.

⁴³⁵ BRANT, pp. 117 *et seq.*

⁴³⁶ ILA, *Interim Report*, p. 20; BEN HAMIDA, para. 85.

against the same respondent, basing its claim in one case on customary international law and, in the other case, on a treaty provision. It would also not apply if a same party based identical claims on provisions contained in different treaties.

289. Such a strict application of the identity of cause requirement has been criticised as it may lead to the duplication of proceedings which in reality are substantively identical⁴³⁷. It would appear artificial to consider two legal grounds which contain the same legal rule as different causes for the purposes of *res judicata*⁴³⁸. It appears more appropriate to look at the specific rules relied upon and to examine how far they are substantively identical⁴³⁹. If the same rule is reflected in different legal instruments, identity of the cause should be admitted⁴⁴⁰.

290. This approach has some foundation in international practice. In the *Southern Bluefin Tuna* case an arbitral tribunal under UNCLOS had to decide whether a dispute about Japanese fishing practices was to be settled under the 1993 Convention for the Conservation of Southern Bluefin Tuna (CCSBT) or under UNCLOS. The tribunal decided that the dispute was to be settled under the CCSBT and declined jurisdiction. The tribunal also pronounced itself on the question of the identity of the dispute over fishing practices, which can be viewed under the rules of the CCSBT and UNCLOS:

“[T]he Parties to this dispute [...] are the same Parties grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions. To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial”⁴⁴¹.

291. The tribunal considered that there was only one dispute despite the fact that it was based on two different treaties. The tribunal reached this decision even though the treaties in question were fairly different; they related, however, to the same factual

⁴³⁷ See, e.g., REINISCH, pp. 64 *et seq.*; BEN HAMIDA, paras 84 *et seq.*

⁴³⁸ REINISCH, p. 64.

⁴³⁹ REINISCH, p. 71.

⁴⁴⁰ REINISCH, pp. 64 *et seq.*

⁴⁴¹ *Southern Bluefin Tuna* case (*Australia and New Zealand v Japan*), Award on Jurisdiction and Admissibility, 4 August 2000, ILM, Vol. 39 (2000), pp. 1359 *et seq.*, para. 54.

background⁴⁴².

292. Other international tribunals have followed a stricter approach. In the *Mox Plant* case between the United Kingdom and Ireland, the ITLOS held:

“the application of international rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and travaux préparatoires”⁴⁴³.

293. This statement of the ITLOS supports the strict approach which considers claims brought under different legal grounds to be based on different causes⁴⁴⁴. It was relied upon by the arbitral tribunal in the *CME* case in support of its decision that claims brought under separate BITs, concerning the same alleged acts of expropriation, constitute different causes for purposes of *res judicata*⁴⁴⁵. The tribunal in the *CME* case stated:

“The two arbitrations are based on differing bilateral investment treaties, which grant comparable investment protection, which, however, is not identical. [...] Because the two bilateral investment treaties create rights that are not in all respects exactly the same, different claims are necessarily formulated”⁴⁴⁶.

Identity of facts?

294. Although, in theory, the test of identity of questions at issue remains limited to identity of object and cause, in practice, the identity of the set of facts underlying a claim plays an important role; there appears to be a tendency to focus on the facts underlying

⁴⁴² See REINISCH, pp. 66 *et seq.*

⁴⁴³ ITLOS, *The Mox Plant Case* (Ireland v United Kingdom), Request for Provisional Measures, Order of 3 December 2001, para. 51.

⁴⁴⁴ *Contra*: REINISCH, pp. 68 *et seq.*

⁴⁴⁵ See also ICSID, *Helwan International Hotels A/S v The Arab Republic of Egypt*, Award of 3 July 2008, para. 130. The tribunal held that there was no identity of causes of action: while the relief sought in the prior “Egyptian Arbitration” was based on a contract, the relief sought in the ICSID arbitration was based on a treaty.

⁴⁴⁶ UNCITRAL, *CME Czech Republic BV v The Czech Republic*, Final Award, 14 March 2003, paras 432 *et seq.*

the claims in order to determine whether two disputes are identical or not⁴⁴⁷.

Identity of legal order

295. The doctrine of *res judicata* generally applies only between international courts and tribunals, *i.e.* between tribunals operating within the same legal order⁴⁴⁸. The same legal order comprises international law. It is understood broadly and includes tribunals established under treaties and mixed arbitral tribunals adjudicating disputes between private parties and states⁴⁴⁹.

296. It is generally considered that a domestic judgment cannot constitute a *res judicata* in relation to international courts and tribunals.⁴⁵⁰ This is because disputes brought before tribunals from different legal orders are generally not of the required degree of similarity for the doctrine of *res judicata* to apply⁴⁵¹. However, more recently it has been argued that the doctrine of *res judicata* could apply between domestic courts and international courts and tribunals. First, if the regulated interactions are not organised in a hierarchical manner and, second, if the judicial bodies involved in

⁴⁴⁷ See in particular REINISCH, pp. 70 *et seq.*

⁴⁴⁸ See generally REINISCH, pp. 51 *et seq.* See also arbitral award rendered in *Affaire des Chemins de fer de Bușan-Neboiasi* (Germany v Romania), 7 July 1939, RIAA, Vol. III, p. 1836 (“*En général, les décisions nationales et internationales se meuvent dans les sphères différentes. Au regard des Etats étrangers, les décisions des tribunaux nationaux sont moins des jugements que de simples manifestations de l’activité étatique, pareilles dans leur principe à celles de tout autre organ de l’Etat. C’est dans l’ordre interne seulement que l’autorité de la chose jugée par un tribunal national trouve son application*”). See also ICSID, *Helnan International Hotels A/S v The Arab Republic of Egypt*, Award of 3 July 2008. In this case, the ICSID tribunal had to determine whether and to what extent a national award rendered in Cairo under Egyptian law (namely on contract claims) could operate as a *res judicata* in the ICSID proceedings on treaty claims. In other words, the question was whether a “national *res judicata* may be relied upon in [...] international proceedings and, if so, to what extent” (para. 123). The tribunal held that national courts or private arbitral tribunals, on the one hand, and international courts or tribunals, on the other hand, are not part of the same legal order. As a consequence, “a decision by a national court or a private arbitral tribunal cannot be opposed as *res judicata* to the admissibility of an action filed with an international arbitral tribunal [...]. On the other hand, an international tribunal must accept the *res judicata* effect of a decision made by a national court within the legal order where it belongs”. Accordingly, in the opinion of the ICSID tribunal, a national court decision or arbitral award on contract claims cannot operate as a *res judicata* to bar the jurisdiction of an ICSID tribunal on treaty claims, because these decisions are not part of the same legal order. However, the national decision has *res judicata* effects within its own national legal order. Therefore, the ICSID tribunal, when applying the law of this national legal order (here Egyptian law), must respect the *res judicata* effect of the national decision with regard to final determinations on the relevant national law.

⁴⁴⁹ ILA, *Interim Report*, p. 19.

⁴⁵⁰ SHANY, *Competing Jurisdictions*, p. 254; SHANY, *Regulating Jurisdictional Relations*, pp. 160 *et seq.*; BROWNLIE, pp. 50 *et seq.*; PCIJ, *Case Concerning Certain German Interests in Polish Upper Silesia (the Merits)*, cited *supra*, fn 368, p. 20.

⁴⁵¹ SHANY, *Regulating Jurisdictional Relations*, p. 3. See also, BROWNLIE, p. 50. See also ICSID, *Helnan International Hotels A/S v The Arab Republic of Egypt*, Award of 3 July 2008, para. 124.

jurisdictional interactions are authorised to apply the doctrine of *res judicata* either with direct reliance on international law or on domestic law rules that mirror international law in their substance⁴⁵². This will be discussed in further detail below with regard to the relations between international arbitral tribunals and domestic courts⁴⁵³.

3. CONCLUSION

297. The above analysis has shown how the doctrine of *res judicata* as developed in domestic laws has been transposed to international law.

298. In private international law, the EC Regulation No. 44/2001 and the Hague Convention on Choice of Court Agreements do not contain express provisions on *res judicata*⁴⁵⁴. However, an attempt to develop a transnational *res judicata* doctrine has been made by the ALI/UNIDROIT Principles of Transnational Civil Procedure. These principles provide for the application of the doctrine of *res judicata* as developed mainly in civil law countries⁴⁵⁵.

299. In public international law, the doctrine of *res judicata* resembles the doctrine in domestic laws. The *res judicata* doctrine was introduced into public international law by operation of Article 38 (1)(c) of the ICJ Statute, *i.e.* as a principle accepted by all nations *in foro domestico*. This suggests that there is a generally accepted concept of *res judicata* in domestic laws. However, as was seen in the first chapter of this research, important differences exist among domestic laws, particularly regarding the effects attached to a decision that is *res judicata* and the requirements that must be met in order for the *res judicata* doctrine to apply. These differences among domestic laws surface in public international law. Although the doctrine is well established in public international law, uncertainties exist, particularly in those areas where there are divergences among domestic laws. Different international courts and tribunals have applied different standards to assess the identity between two disputes. Likewise, it is unclear to what extent the doctrine of *res judicata* covers issue preclusion in addition to claim preclusion.

⁴⁵² See SHANY, *Regulating Jurisdictional Relations*, pp. 125 *et seq.*

⁴⁵³ See *infra*, paras 583 *et seq.*

⁴⁵⁴ See *supra*, paras 195 *et seq.*

⁴⁵⁵ See *supra*, paras 231 *et seq.*

300. The application of the doctrine of *res judicata* by international courts and tribunals has been sporadic and not always consistent⁴⁵⁶. While this may be explained by the uncertainties surrounding *res judicata* in international law, it also appears to denote a certain readiness on the part of some international courts to depart from strict *res judicata* rules as developed and applied in the domestic context. International courts seem to be more willing to apply a flexible approach. As will be discussed in further detail below, such a readiness to depart from strict domestic *res judicata* rules in favour of more flexible rules, can also be observed in international arbitration case law⁴⁵⁷.

On the basis of the above findings it is now necessary to investigate whether and how the doctrine of *res judicata* as developed in the context of litigation may or should be applied in international commercial arbitration.

⁴⁵⁶ SHANY, *Competing Jurisdictions*, pp. 253 *et seq.*

⁴⁵⁷ See *infra*, paras 435 *et seq.*

PART II

The Doctrine of *Res Judicata* in International Commercial Arbitration

Si l'ordre est le plaisir de la raison, le désordre est le délice de l'imagination.

(Paul Claudel)

301. Would it be advisable for international arbitral tribunals to apply domestic *res judicata* rules developed for litigation? Should they apply the *res judicata* rules of a particular domestic law and, if so, which one? Or should they apply a transnational *res judicata* doctrine, detached from any particular domestic law? Alternatively, arbitral tribunals could be given the authority to deal with *res judicata* issues as they deem appropriate in the circumstances of each particular case and any problems of conflicting judgments or awards could then be dealt with at the recognition and enforcement stage.

302. These are some of the questions that will be dealt with in this part of the research. It will be necessary to answer these questions in order to achieve the aim of

this part, which is to determine how arbitral tribunals should deal with *res judicata* issues.

303. Before attempting to propose any answers to the above questions, it is necessary to identify the problem. Adequate solutions may only be found once it has been established that *res judicata* constitutes a problem in international commercial arbitration and once the characteristics of this problem have been identified. Chapter Three will identify situations in which *res judicata* issues may arise before international commercial arbitral tribunals. Chapter Four will then investigate how *res judicata* issues are currently dealt with in international arbitration law and practice; it will demonstrate that the current way of dealing with these issues is unsatisfactory and may lead to important problems.

304. After the existence and characteristics of the problem have been established it will be possible to investigate how arbitral tribunals should deal with *res judicata* issues. Chapter Five will determine the appropriate approach to the problem of *res judicata* in international commercial arbitration. It will examine whether arbitral tribunals should apply the litigation concept of *res judicata* as applied by domestic and international courts and tribunals. The chapter will investigate whether, and to what extent, an analogy between litigation and international arbitration is possible and appropriate for purposes of *res judicata*. Finally, Chapter Six will suggest solutions to the problem of *res judicata* in international commercial arbitration.

CHAPTER 3

Res Judicata Issues Arise in International Commercial Arbitration

305. This chapter will determine situations in which *res judicata* issues arise before arbitral tribunals. The aim is to determine the reality and magnitude of the phenomenon of *res judicata* in international arbitration. In particular, the aim is to establish that *res judicata* issues may frequently arise before international arbitral tribunals in various situations. Due to the growing importance and complexity of international arbitration it is to be expected that the occurrence of *res judicata* issues in international arbitration practice will further increase. The phenomenon of *res judicata* in international arbitration therefore is not of merely academic interest. To the contrary, it constitutes a real problem that remains largely unsolved and this research may thus contribute to finding solutions to this problem.

306. ILA's Interim Report on *res judicata* and arbitration stated that issues of *res judicata* arise before international arbitral tribunals in a myriad of different situations. These situations may be sorted into four categories, based on the nature of the court or tribunal having rendered the first final and binding decision. According to the report, issues of *res judicata* arise (i) between arbitral tribunals and state courts; (ii) between different arbitral tribunals; (iii) within a same arbitration proceeding between a partial and a final award; and (iv) between supra-national courts or tribunals and arbitral

tribunals⁴⁵⁸. The fourth category concerns mostly investment protection treaty cases⁴⁵⁹. Since the scope of this research is limited to international commercial arbitration, the following analysis will only cover the first three categories.

307. In this chapter the term “issues of *res judicata*” will be used to generally describe situations in which a particular issue or dispute which has already been determined in prior court or arbitration proceedings, or within the same arbitration proceedings, arises again before an international arbitral tribunal. The term will refer to situations where a party might want to rely upon a prior award or judgment arguing that the arbitral tribunal is bound by the prior determination of a particular issue or dispute.

1. ISSUES OF *RES JUDICATA* BETWEEN ARBITRAL TRIBUNALS AND STATE COURTS

308. In international arbitration issues of *res judicata* perhaps arise most commonly between state courts and arbitral tribunals⁴⁶⁰. However, in practice it should be rare that an arbitral tribunal is faced with the question of the *res judicata* effect of a prior judgment rendered on precisely the same facts and cause of action and between the same parties. This is because the substantive issues before the arbitral tribunal will usually be covered by the parties’ arbitration agreement and therefore will not previously have arisen before a national court⁴⁶¹. Where arbitral tribunals are faced with a *res judicata* issue it is usually with respect to prior findings of facts or determinations of particular issues forming part of a larger whole. Thus, in most cases what is called upon

⁴⁵⁸ ILA, *Interim Report*, pp. 3 *et seq.*; See also SHEPPARD, *The Scope and Res Judicata Effect of Arbitral Awards*, p. 274; CRIVELLARO, p. 86; MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage international*, pp. 195 *et seq.*

⁴⁵⁹ See in particular SHEPPARD, *Res judicata and estoppel*, p. 221. Outside the scope of investment protection treaty cases, international commercial arbitral tribunals may have to consider the *res judicata* effect of prior judgements of the ECJ and the ECHR.

⁴⁶⁰ ILA, *Interim Report*, p. 4; SHEPPARD, *The Scope and Res Judicata Effect of Arbitral Awards*, p. 275; CRIVELLARO, p. 86.

⁴⁶¹ BORN, p. 2916. However, such a situation may arise, for instance, where a party brings proceedings on the merits before a state court in order to frustrate the arbitration or to maximise its chances of success. A party may file proceedings on the merits before a state court in a favourable jurisdiction to attempt to ensure that an award will not be enforceable in that state. The party having initiated the court proceedings may rely before the arbitral tribunal on the binding force of the state court’s decision over the entire dispute (ILA, *Interim Report*, p. 4; HOBÉR, p. 243). It is also possible to imagine that the parties conclude an arbitration agreement after the resolution of the dispute by a state court. It should be considered, however, that the parties waive their right to invoke the *res judicata* effect of the prior judgment in the subsequent arbitration proceedings (LANDOLT, p. 245; MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage international*, p. 195, fn 26).

to decide overlaps to a certain degree with what has already been decided in a prior award or judgment⁴⁶².

309. *Res judicata* situations may typically arise where a state court has rendered a prior decision regarding the arbitral tribunal's jurisdiction. State courts and arbitral tribunals will usually closely examine their jurisdiction and scrutinize the validity of a potential arbitration agreement, the real will of the parties and the coverage of the agreement⁴⁶³. While in most cases the state court and arbitral tribunal will probably reach the same conclusion, in some cases the question will arise whether the arbitral tribunal is bound by the court's prior determinations regarding the jurisdiction of the arbitral tribunal⁴⁶⁴.

310. *Res judicata* situations also commonly arise where a state court has rendered a prior decision on interim measures⁴⁶⁵ as state courts and arbitral tribunals usually have concurrent jurisdiction with regard to interim measures⁴⁶⁶. Such a *res judicata* issue arose in ICC Case No. 4126 of 1984 and in *A v Z*, Order No. 5 of 2 April 2002. In both cases the arbitral tribunal had to decide whether a party could seek interim relief in the arbitration despite the fact that an identical or similar request for relief had previously

⁴⁶² LANDOLT, pp. 242 *et seq.*

⁴⁶³ SCHULZ, p. 4.

⁴⁶⁴ See, *e.g.*, CRCICA Case No. 67/1995. In this case, the dispute arose out of a contract between A and B and contained an arbitration agreement providing for CRCICA arbitration. A obtained a judgment from the courts in Egypt holding that the contract in dispute was one of agency and that, according to Egyptian law, such disputes are not arbitrable. When B initiated CRCICA arbitration proceedings, A raised lack of jurisdiction arguing that the judgment of the Egyptian courts operated as a *res judicata* in the arbitration. See also *Deutsche Schachtbau- und Tiefbohrergesellschaft mbH v Ras Al Khaimah National Oil Co and another appeal* [1987] 2 All ER 769. In this case, a dispute arose out of an oil exploration agreement concluded between Deutsche Schachtbau- und Tiefbohrergesellschaft mbH (DST) and Ras Al Khaimah National Oil Co (Raknoc). In March 1979, DST initiated ICC arbitration proceedings in Geneva based on the arbitration agreement contained in the oil exploration agreement. In April 1979 Raknoc instituted proceedings in the court of R'as Al Khaimah for the rescission of the agreement on the ground that it had been obtained by misrepresentation and also for damages. Conflicting decisions ensued from the arbitration and court proceedings: DST succeeded in the arbitration and Raknoc succeeded in the litigation. See also *Fomento de Construcciones y Contratas SA v Colon Container Terminal SA* (DTF 127 III 279). Parallel proceedings were brought before the courts in Panama and before an ICC arbitral tribunal in Geneva. The question was whether Colon Container Terminal SA (CCT) had accepted the jurisdiction of the Panamanian courts by not raising lack of jurisdiction based on an arbitration agreement on time. The arbitral tribunal ruled that it had jurisdiction over the dispute. However, two months after the award was rendered, the Supreme Court of Panama decided that CCT had raised lack of jurisdiction too late and that the Panamanian courts therefore had jurisdiction to hear the dispute. The *Fomento* case illustrates the situation where an arbitral tribunal and a state court both render conflicting decisions on jurisdiction over an identical dispute. If both proceedings continue parallelly, issues of *res judicata* may arise before the arbitral tribunal. See also ICC Case No. 6363, 1991; ICC Case No. 6535, 1992.

⁴⁶⁵ LANDOLT, p. 243.

⁴⁶⁶ See in particular YEŞİLIRMAK, paras 3-20 *et seq.* See also POUURET/BESSON, paras 611 *et seq.*

been denied by a state court

311. Other situations where there can be overlap between the prior determinations of a court and an arbitral tribunal involve the positive *res judicata* effect and issue estoppel. These situations arise typically where a state court has decided a certain issue, either as a preliminary or a principal issue, and the same issue is later raised again between the same parties before an arbitral tribunal. The question is whether the arbitral tribunal is bound by the court's prior determinations and should integrate them in its award⁴⁶⁷.

312. Similar questions arise in complex disputes involving multiple parties or contracts⁴⁶⁸. The possible preclusive effects of a prior judgment on subsequent arbitration proceedings in such a situation were discussed in ICC Case No. 6363. In this case, a first contract was concluded in 1978 between A and B. This contract contained an arbitration clause providing for ICC arbitration in Zurich. A second contract was concluded in 1980 between A and C. In the 1980 contract A assigned its rights and obligations towards B to C, including A's right to receive royalties from B. When B refused to pay royalties, C initiated court proceedings against B. After the state court dismissed C's claim, A initiated ICC arbitration proceedings against B claiming payment of unpaid royalties. B invoked the *res judicata* effect of the prior court decision. The arbitral tribunal had to decide whether the prior judgment rendered between C and B could operate as a *res judicata* in arbitration proceedings between A and B, what the content of this *res judicata* was and against whom it applied⁴⁶⁹.

⁴⁶⁷ MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage international*, p. 197 *et seq.*

⁴⁶⁸ See RIVKIN, p. 270; HOBÉR, pp. 248 *et seq.*; CRIVELLARO, p. 81; SCHNEIDER, pp. 102 *et seq.*

⁴⁶⁹ See also ICC Case No. 9787, 1998. In this case the possible impact of a parallel court proceeding on arbitration proceedings was discussed. A buyer, a Chinese manufacturer, entered into a series of contracts with a seller, a US company. When disputes arose, the buyer initiated an ICC arbitration claiming damages. The seller counterclaimed for payment. After the initiation of the ICC arbitration, buyer's counsel initiated court proceedings in the US against seller's counsel. Neither buyer nor seller were parties in the US court proceedings. Nevertheless, seller raised lack of jurisdiction before the arbitral tribunal on the ground that the arbitration and court proceedings were congruent, *i.e.* that both the US court and the arbitral tribunal would be required to rule upon the same issues of fact and law. The arbitral tribunal had to determine whether the US court proceedings affected the jurisdiction of the arbitral tribunal under the parties' arbitration agreement.

2. ISSUES OF *RES JUDICATA* BETWEEN DIFFERENT ARBITRAL TRIBUNALS

313. The situation where *res judicata* issues arise between two arbitral tribunals resembles the situation where an arbitral tribunal has to determine the *res judicata* effects of a prior judgment: most situations will involve a certain overlap with issues now before the arbitral tribunal and issues previously decided by another arbitral tribunal⁴⁷⁰.

314. As before, this overlap may concern the arbitral tribunal's jurisdiction. The arbitral tribunals will scrutinize the validity and coverage of the arbitration agreement, as well as the intention of the parties. In most cases the tribunals will agree that only one of the clauses is valid (*e.g.* because it has been superseded by the other, more recent one⁴⁷¹) or covers the dispute at issue⁴⁷². It seems that the intention of the parties, as interpreted by the tribunals, generally is a strong (and often sufficient) guideline for the tribunals. It is only in rare cases that both tribunals will interpret two agreements to cover the same subject matter between the same parties and both tribunals will assume that the clause conferring jurisdiction on it does prevail over the other clause⁴⁷³. In such a situation the question arises whether an arbitral tribunal is bound by the prior determinations regarding jurisdiction of another tribunal.

⁴⁷⁰ KREMSLEHNER, pp. 142 and 151-52. Issues of *res judicata* have arisen between two different arbitral tribunals on several occasions. The underlying facts of these arbitrations are not always reported with sufficient detail, making it not always possible to determine under which category of situations these awards may fall. See, *e.g.*, ICC Case No. 6233, 1992 (claimant entered into several contracts with respondent. These contracts gave rise to two ICC arbitrations, one resulting in an award condemning respondent to pay certain sums to claimant, and another condemning claimant to pay certain amounts to respondent. Claimant requested a newly composed arbitral tribunal to interpret the two awards. Before the newly constituted arbitral tribunal the respondent invoked the *res judicata* effect of the prior awards); ICC Case No. 5901, 1989, award reported by HASCHER, p. 19 (*res judicata* issues arose between two awards rendered by a first arbitral tribunal with seat in Switzerland and by a second arbitral tribunal with seat in France).

⁴⁷¹ See, *e.g.*, the underlying dispute in *Arthur Andersen Business Unit Member Firms v Andersen Consulting Business Unit Member Firms*. Different standard contracts concluded between the various entities of Andersen contained contradictory arbitration agreements. Parallel ICC and *ad hoc* arbitration proceedings were initiated based on these conflicting agreements. The Swiss Federal Tribunal put an end to the debate on the tribunals' jurisdiction by upholding the ICC tribunal's decision according to which the most recent arbitration agreement would govern all disputes (DTF, 8 December 1999, ASA Bulletin, Vol. 18, No. 3 (2000), pp. 546 *et seq.*).

⁴⁷² According to MAYER, arbitral tribunals generally do not like to question the awards of other tribunals (*Litispendance, connexité et chose jugée dans l'arbitrage international*, p. 196, fn 29).

⁴⁷³ SCHULZ, pp. 4 *et seq.* (on the comparable situation opposing a court chosen by an exclusive choice of court agreement and an arbitral tribunal).

315. This question arose in ICC Case No. 3383 of 1979⁴⁷⁴, a case in which the parties initiated different arbitrations based on different arbitration agreements in order to arbitrate a dispute arising out of the same legal relationship. The Belgian party initiated arbitration proceedings based on an ICC arbitration clause. The Iranian party objected to the jurisdiction of the ICC tribunal on the grounds that the ICC rules of arbitration were contrary to applicable Iranian law. During the first hearing the parties concluded a new arbitration agreement renouncing to ICC arbitration and constituting an *ad hoc* arbitral tribunal which had to render an arbitral award within three months. When the *ad hoc* tribunal decided to prolong its mandate, the Iranian party refused to continue to participate in the arbitration arguing that the arbitral tribunal had no power to prolong its mandate without the formal agreement of the parties. After the *ad hoc* tribunal decided that it did not have the power to continue the arbitration, the Belgian party initiated new ICC proceedings based on the original ICC arbitration agreement. The new ICC tribunal had to decide whether it was bound by the prior award of the *ad hoc* tribunal. In particular, it had to decide whether the prior award had finally determined that there was a valid arbitration agreement providing for *ad hoc* arbitration, thereby excluding the existence of a valid ICC arbitration agreement⁴⁷⁵.

316. *Res judicata* issues can also arise in situations involving the positive *res judicata* effect and issue estoppel. This may happen if one party brings new arbitration proceedings on the grounds that a prior award did not exhaust all the differences existing between the parties⁴⁷⁶. In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*⁴⁷⁷, Persero brought two subsequent SIAC arbitration proceedings in relation with an

⁴⁷⁴ See also ICC Case No. 5423, 1987 (an arbitral tribunal with seat in Paris had to decide on the validity of an arbitration agreement. The tribunal held that the agreement was null and void, but only with regard to ICC arbitration. An arbitral tribunal subsequently seized of the dispute might have to decide if and to what extent it is bound by the prior ICC award on the partial nullity of the arbitration agreement).

⁴⁷⁵ Similarly, *res judicata* issues may arise where the same parties initiate different arbitrations based on different arbitration agreements in order to arbitrate disputes arising out of a closely related legal relationship. Such situations may arise in disputes involving multiple contracts relating to the same business or project, such as distribution contracts and ensuing sales relationships (ILA, *Interim Report*, pp. 3 *et seq.*). It has not infrequently happened that different arbitration clauses, in particular with different places of arbitration, were inserted in successive contracts related to the same construction project (SCHNEIDER, p. 102).

⁴⁷⁶ ILA, *Interim Report*, p. 4; SHEPPARD, *The Scope and Res Judicata Effect of Arbitral Awards*, p. 274. See also MERKIN, para. 18.129.

⁴⁷⁷ High Court, 20 October 2005, *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] 1 SLR 197; Court of Appeal, 1 December 2006, *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597.

almost identical dispute. In the second arbitration, Persero raised an issue which had not been covered in the first arbitration. The second arbitral tribunal held that Persero was estopped from raising the issue in the second arbitration because it could and should have raised it in the first arbitration. In response, Persero brought an action before the courts of Singapore requesting the setting aside of the second SIAC award on the grounds that the second arbitral tribunal had made findings inconsistent with the first award. Persero argued that the second SIAC tribunal was bound by the findings in the prior SIAC award. Thus, the question before the Singapore courts was whether the first SIAC award gave rise to issue estoppel in the second SIAC proceedings⁴⁷⁸.

317. Similarly, *res judicata* issues involving the positive *res judicata* effect and issue estoppel may arise between two different arbitral tribunals where an amendment to a claim or a counterclaim cannot be brought before the constituted arbitral tribunal, *e.g.* because of late filing, and must hence be brought in parallel arbitration proceedings⁴⁷⁹.

318. Likewise, the parties may sometimes have to bring more than one arbitration in relation with the same factual situation. For instance, under some insurance policies, claims against the same insurance company under different policies must be brought before different arbitral tribunals⁴⁸⁰. In *Aegis v European Re*⁴⁸¹ Aegis initiated two separate arbitrations against European Re based on the same arbitration agreement. The arbitrations concerned two separate disputes arising under the same reinsurance contract and out of the same underlying facts. Both disputes concerned European Re's obligation to indemnify Aegis. European Re won the first arbitration and sought to rely upon the first award in the second arbitration, raising a plea of issue estoppel.

319. *Res judicata* issues may arise between two different arbitral tribunals in case of disputes involving multiple parties, *e.g.* disputes involving an employer, a contractor and a subcontractor. An employer may wish to initiate an arbitration against a contractor for

⁴⁷⁸ See also the situation underlying Cour de cassation, 28 May 2008, *Sté G. et A. Distribution SARL v Sté Prodin SAS*, Rev. arb., No. 3 (2008), pp. 461 *et seq.*; Iran-United States Claims Tribunal, Case No. A33, Award of 9 September 2004.

⁴⁷⁹ ILA, *Interim Report*, p. 4; SHEPPARD, *The Scope and Res Judicata Effect of Arbitral Awards*, p. 274.

⁴⁸⁰ *Ibid.*

⁴⁸¹ *Associated Electric and Gas Insurance Services Ltd (Aegis) v European Reinsurance Company of Zurich (European Re)* [2003] 1 WLR 1041.

the faulty performance of one of the subcontractors. The contractor in turn may wish to commence an arbitration against the subcontractor relying on the back-to-back liability of the subcontractor under the agreement with the contractor⁴⁸². Chain sales contracts also typically involve multiple parties and may give rise to related disputes being brought before different arbitral tribunals⁴⁸³.

320. A question of issue estoppel between two awards rendered in different arbitrations between different parties arose in *Sun Life Assurance Co. of Canada et al v The Lincoln National Life Insurance Co.*⁴⁸⁴. The English Court of Appeal had to decide whether an award between A and B may give rise to issue estoppel in a subsequent, separate arbitration on a related dispute between B and C. The claimant in the second arbitration, C, contended that the first arbitral tribunal had finally determined the position between A and B and that B could not go back on this position as against C in the second arbitration. The second arbitral tribunal, however, had decided to depart from the prior determinations of the first arbitral tribunal. The Court of Appeal had to decide whether the second arbitral tribunal was free to do so⁴⁸⁵.

⁴⁸² HOBÉR, p. 248. See also Chamber of National and International Arbitration of Milan, Case No. 1491, 20 July 1992. In this case a dispute arose out of a subcontract concluded between a subcontractor and a main contractor. Following the embargo against Iraq, the main contractor terminated the subcontract. The subcontractor initiated arbitration proceedings against the main contractor. The question arose whether the arbitrator was prevented from deciding on the effects of the embargo on the main contract, due to the fact that the arbitrator had no jurisdiction over the main contract. The arbitrator held that, although it had no jurisdiction over the main contract, it could rule on the effects of the embargo on the main contract as a preliminary issue. The arbitrator also stated that a different arbitral tribunal seised of the dispute relating to the main contract could reconsider and reach a different conclusion on the issue of the effects of the embargo on the main contract.

⁴⁸³ See, e.g., ICC Case Nos 2745 and 2762, 1977. See also HANOTIAU, *Complex Arbitrations*, para. 547.

⁴⁸⁴ *Sun Life Assurance Co. of Canada, American Phoenix Life and Reassurance Co., Phoenix Home Life Mutual Insurance Co. v The Lincoln National Life Insurance Co.*, [2005] 1 Lloyd's Rep. 606.

⁴⁸⁵ See also ICC Case No. 7061, 1997; ICC Case No. 8023, 1995, award reported by HASCHER, p. 21; ICC Case No. 7438, 1994, award reported by HASCHER, pp. 19 and 22. Concerning sports arbitration, see CAS, *Dieter Baumann v International Olympic Committee (IOC), National Olympic Committee of Germany and International amateur Athletic Federation (IAAF)*. Baumann brought CAS proceedings requesting the CAS to (i) set aside a prior IAAF decision banning Baumann for a period of two years; (ii) set aside a prior IOC decision revoking Baumann's accreditation; (iii) determine that Baumann would be eligible to compete in the Sydney Olympic Games. Before the CAS, the IAAF raised lack of jurisdiction arguing that its arbitration panel had already issued a final and binding determination of the dispute. The CAS had to decide whether the IAAF decision was binding on Baumann who had not been a party in the IAAF proceedings.

3. ISSUES OF *RES JUDICATA* BEFORE THE SAME ARBITRAL TRIBUNAL

321. Issues of *res judicata* may also arise within one and the same arbitration, *e.g.* between partial and final awards. The question whether the arbitral tribunal is bound by its prior partial award might prove problematic if new evidence comes to light questioning the correctness of some findings contained in the prior partial award⁴⁸⁶.

322. The question of the *res judicata* effect of a prior partial award on issues to be decided at a later stage of the arbitration proceedings arose in several arbitrations, *e.g.* in ICC Case No. 3267 of 1984⁴⁸⁷. A dispute arose out of a construction subcontract concluded between a Mexican construction company and a Belgian company. During the first few months of performance under the contract the Mexican company failed to meet various milestones and the Belgian company made deductions from instalment payments. After both companies gave notice of termination of the contract, the Mexican company initiated arbitration proceedings against the Belgian company. A fundamental issue in this arbitration was to determine which of the two notices of termination was effective. A partial award was rendered in favour of the Mexican company. In the ensuing arbitration proceedings the arbitral tribunal had to decide if and to what extent it was bound by its prior partial award.

323. A *res judicata* issue may also arise where an arbitral tribunal is requested to reconsider or interpret its prior partial or final award. The *res judicata* doctrine will impose limits on the arbitral tribunal's power to reconsider or interpret its prior awards⁴⁸⁸.

4. CONCLUSION

324. The above analysis clearly establishes that issues of *res judicata* arise in international commercial arbitration; it shows that the phenomenon of *res judicata* before

⁴⁸⁶ ILA, *Interim Report*, p. 3; MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage international*, p. 200.

⁴⁸⁷ See also ICC Case No. 2858, 1996, award reported by HASCHER, p. 30; UNCITRAL, *Antoine Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*; UNCITRAL, *Wintershall AG, International Ocean Resources Inc, Veba Oel AG, Deutsche Schachtbau- und Tiefbohrbesellschaft mbH, Gulfstream Resources Canada Ltd v The Government of Qatar*.

⁴⁸⁸ See, *e.g.*, UNCITRAL, *Antoine Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*; UNCITRAL, *Wintershall AG, International Ocean Resources Inc, Veba Oel AG, Deutsche Schachtbau- und Tiefbohrbesellschaft mbH, Gulfstream Resources Canada Ltd v The Government of Qatar*.

international arbitral tribunals is real.

325. As was seen, international arbitral tribunals may have to deal with issues of *res judicata* in different situations. While it appears that arbitrators most often have to decide on the *res judicata* effect of a prior court decision, *res judicata* issues may also arise between arbitral awards rendered by the same or a different arbitral tribunal. Furthermore, it was seen that within each of the delineated categories *res judicata* issues may arise within a variety of different situations.

326. This chapter has shown that *res judicata* issues have arisen in numerous arbitrations. Many more cases exist. Due to the growing complexity of international disputes it is to be expected that the number of multiple proceedings will further increase in the future. Because of the proliferation of multiple proceedings and an increasing bifurcation of arbitration proceedings, the number of cases in which arbitrators will have to deal with *res judicata* issues will also increase.

327. On the basis of this conclusion it is now necessary to examine whether the occurrence of *res judicata* issues before arbitral tribunals constitutes a problem. For this it is necessary to examine how *res judicata* issues are currently dealt with in international commercial arbitration law and practice and whether there is a need to elaborate additional rules or guidelines to deal with the phenomenon of *res judicata* in international commercial arbitration.

CHAPTER 4

Res Judicata in International Commercial Arbitration - A Problem

328. Issues of *res judicata* arise in international commercial arbitration in a multitude of different situations. So what? The question arises whether the occurrence of *res judicata* issues in international arbitration constitutes a problem that needs to be dealt with. This question in turn raises three sub-questions:

- What are the possible consequences of the occurrence of *res judicata* issues in international commercial arbitration? Expressed differently, what interests are at stake?
- How are *res judicata* issues currently dealt with in international arbitration law and practice?
- Is the way in which arbitral tribunals currently deal with *res judicata* issues satisfactory?

329. The aim of this chapter is to demonstrate that the phenomenon of *res judicata* in international commercial arbitration constitutes a problem. This chapter will seek to achieve its aim by answering the three questions raised above in the order listed. The conclusion will make clear that the way in which *res judicata* issues are currently dealt with is unsatisfactory.

1. INTERESTS AT STAKE DUE TO THE OCCURRENCE OF *RES JUDICATA* ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION

330. In its 2003 resolution concerning the use of the doctrine of *forum non conveniens* and anti-suit injunctions, the Institut de Droit International stated that “[p]arallel litigation in more than one country between the same, or related, parties in relation to the same, or related, issues should be discouraged”⁴⁸⁹ as it “may lead to injustice, delay, increased expense, and inconsistent decisions”⁴⁹⁰. As will be seen below, the same holds true for successive duplicative proceedings. Repetitions of proceedings may entail various negative consequences not only for the parties, but also for the international arbitration process as a whole.

Waste of resources

331. Duplicative proceedings draw heavily on judicial resources. The parties are required to invest considerable amounts of time, money and efforts in proceedings which they already went through⁴⁹¹. Similarly, although the arbitrators will of course be remunerated for their task, they are nevertheless required to unnecessarily invest time and efforts in determining already settled issues⁴⁹². Hence, the accepted principles of judicial efficiency and procedural economy are put into question.

Undue burden on the winning party in the first proceedings

332. Duplicative proceedings also put an additional burden on the party who prevailed in the first proceedings and who is unwillingly exposed to successive arbitration proceedings. The losing party in the first proceedings might try to re-litigate the same dispute before an international arbitral tribunal. Such a repetition of proceedings seems inherently unfair and runs contrary to the established principle of *ne bis in idem* according to which a party should not have to defend itself twice for the same action. It would expose the party who prevailed in the first proceedings to major

⁴⁸⁹ IDI, *Forum non conveniens and anti-suit injunctions*, para. 3, p. 2.

⁴⁹⁰ IDI, *Forum non conveniens and anti-suit injunctions*, para. d, p. 1.

⁴⁹¹ SHANY, *Competing Jurisdictions*, p. 155 and p. 164. See also *A v Z*, Order No. 5, 2 April 2002, pp. 815 *et seq.*

⁴⁹² SHANY, *Competing Jurisdictions*, p. 156.

inconveniences, such as having to preserve evidence for an indefinite period of time⁴⁹³. Such a scenario would put the important principles of procedural fairness and legal certainty at stake⁴⁹⁴.

Risk of inconsistent decisions

333. The duplication of proceedings creates a risk of inconsistent decisions. It has been submitted that the coexistence of inconsistent decisions “could seriously undermine the very existence of the arbitral process”⁴⁹⁵.

334. The coexistence of multiple and possibly inconsistent decisions carries with it various negative consequences:

- It undermines the finality of decisions. If parties can repeatedly re-litigate a same dispute, the dispute might remain unresolved indefinitely; the parties will have no incentive to comply with any decision rendered⁴⁹⁶. The very purpose of the adjudication system to finally determine the legal rights between the parties and put an end to the dispute would be put into question.
- The occurrence of inconsistent decisions undermines fairness, frustrating the parties’ legitimate expectation that identical cases will be treated alike. It has been submitted that, in as much as justice requires that like cases be treated alike, the occurrence of inconsistent decisions violates the parties’ right to justice and threatens the Rule of Law itself⁴⁹⁷.
- The credibility of both the prior and the subsequent proceedings are undermined. The rendering of inconsistent decisions may give the impression that the application of the law is not objective and dependent on the strength of the legal argument but rather subjective and dependent on the identity of the judges or

⁴⁹³ SHANY, *Competing Jurisdictions*, p. 164; HARNON, p. 545; VESTAL, p. 34.

⁴⁹⁴ HOBÉR, p. 247.

⁴⁹⁵ GALLAGHER, para. 17-1.

⁴⁹⁶ SHANY, *Competing Jurisdictions*, p. 164. See also RIVKIN, p. 271.

⁴⁹⁷ LOWE, pp. 47 *et seq.*

arbitrators⁴⁹⁸.

- The effectiveness of both proceedings is put into question⁴⁹⁹. In particular, the rendering of inconsistent decisions may weaken the effectiveness of the second arbitration because the courts of the seat of the arbitration could set aside the award on the grounds that it is inconsistent with another decision previously rendered, recognised or recognisable in the same state⁵⁰⁰. It may also be difficult or even impossible for the parties to obtain the enforcement of an award that is inconsistent with another decision in the enforcement state⁵⁰¹. Even if enforcement is obtained, the parallel enforcement of inconsistent decisions in different countries is equally unsatisfactory. In such situations, the parties' dispute cannot be said to have been effectively resolved.
- The rendering of inconsistent decisions undermines legal certainty and predictability. The parties should be able to expect as much predictability and certainty as possible, given that, at the end of the proceedings, there will be a final and binding decision determining their legal rights.
- Finally, the ability of the law to provide effective guidance and the process of developing clear normative standards are also at stake⁵⁰².

335. Accordingly, inconsistent decisions rendered by international arbitral tribunals put into question the predictability, certainty, effectiveness, credibility and fairness of international arbitration. A high degree of uncertainty as to the direction of arbitration case law might undermine the parties' confidence in international arbitration and discourage them from referring disputes to arbitration⁵⁰³. After the rendering of two conflicting awards in the CME and Lauder arbitrations, counsel for the Czech Republic described the situation as "absolutely ludicrous, and highly regrettable for the fact that it

⁴⁹⁸ SHANY, *Competing Jurisdictions*, p. 285.

⁴⁹⁹ SHANY, *Competing Jurisdictions*, p. 124.

⁵⁰⁰ HANOTIAU, *Complex Arbitrations*, para. 543.

⁵⁰¹ In *Fomento de Construcciones y Contratas SA v Colon Container Terminal SA* the Swiss Federal Tribunal held that the coexistence of two contradictory decisions rendered with regard to the same dispute and between the same parties would violate public policy (DTF 127 III 279, consid. 2b).

⁵⁰² SHANY, *Competing Jurisdictions*, p. 117.

⁵⁰³ SHANY, *Competing Jurisdictions*, p. 124.

makes the law look so stupid”. He added: “It makes one appreciate how uncertain the arbitral process is. You have to conclude that arbitration is too hazardous – you must go to a national court [where] [...] you can get mistakes corrected by an appeal”⁵⁰⁴. It must be noted that counsel for the Czech Republic had rejected five alternative offers from the claimant to consolidate the two arbitration proceedings and thereby avoid the risk of inconsistent awards. The words of counsel for the Czech Republic are nevertheless alarming and raise great concern for the reputation of the international arbitration process⁵⁰⁵.

336. The existence of inconsistencies may be beneficial to adjudication systems in general and international arbitration in particular as inconsistencies may promote the development of the law in the long run. It has been argued that inconsistent legal pronouncements bring controversial questions to the front and encourage debate and brainstorming which might spur legislation on the matter. After a certain while of debating, the inconsistencies get narrowed down and a solution emerges that might become *jurisprudence constante*. Furthermore, inconsistencies encourage cross-fertilisation and might compel judicial bodies to improve their methods of operation and quality of work in order to attract more business⁵⁰⁶.

337. However, the arguments against inconsistent decisions seem to outweigh the arguments in favour of inconsistent decisions, in particular in *res judicata* situations *stricto sensu* where a same matter, arising out of the same set of facts has already been decided between the same parties in prior proceedings⁵⁰⁷. In the long run inconsistencies cannot be tolerated as the parties could otherwise lose confidence in the adjudication system and avoid using it. Furthermore, while arbitral tribunals are certainly involved in the academic process of developing international arbitration law, the arbitrators’ primary task is not an academic one, but a practical one. Their task is to resolve a given dispute fairly and efficiently. The parties are seeking the resolution of a particular dispute. They are not looking for an opportunity to contribute, at their own expense, to the

⁵⁰⁴ Quotes reported in BROWER/BROWER II/SHARPE, p. 428.

⁵⁰⁵ BROWER/BROWER II/SHARPE, p. 428.

⁵⁰⁶ On this “progress through catastrophe” argument, see SHANY, *Competing Jurisdictions*, pp. 122 *et seq.*

⁵⁰⁷ SHANY, *Competing Jurisdictions*, p. 124.

development of the law⁵⁰⁸. Nor do they owe a duty to the arbitration community or are required “to help make the world a better place”⁵⁰⁹.

338. The interests at stake due to the occurrence of *res judicata* issues before international arbitral tribunals are of major importance. They must be safeguarded in order for international arbitration to preserve its legitimacy and reputation as an effective adjudication system.

2. HOW ARE *RES JUDICATA* ISSUES CURRENTLY DEALT WITH IN INTERNATIONAL COMMERCIAL ARBITRATION LAW AND PRACTICE?

339. Before attempting to find solutions to the problem of *res judicata* before arbitral tribunals, it is important to examine the current state of law and practice. The dual objective of this analysis is to determine not only what is provided for, but also the limits and gaps of international arbitration law and practice with respect to *res judicata*. The outcome of this investigation will determine the starting point and delineate the search for possible solutions.

340. The following analysis will first examine how *res judicata* issues are currently dealt with in international commercial arbitration law (2.1.). It will then investigate how the law is applied and supplemented by international commercial arbitration practice (2.2.).

2.1. International Commercial Arbitration Law

341. International commercial arbitration law comprises various rules from different sources, namely domestic arbitration laws, arbitration rules of arbitration institutions and international arbitration conventions. In addition to this “hard law”, it is worth mentioning arbitration “soft law”, *i.e.* non-binding professional guidelines, which may have considerable persuasive authority. The following analysis will examine these sources in the order mentioned to determine whether and to what extent they deal with

⁵⁰⁸ REDFERN/HUNTER/BLACKABY/PARTASIDES, para. 1-113.

⁵⁰⁹ Remark made on 18 November 2008 by Prof Radicati di Brozolo in the OGEMID email discussion entitled “Thoughts on an Arbitration Database” (available at www.transnational-dispute-management.com).

res judicata issues arising before international arbitral tribunals.

2.1.1. Domestic Arbitration Laws

342. Domestic arbitration laws frequently state the general principle that arbitral awards have *res judicata* effects. This principle is today generally accepted through all common and civil law jurisdictions⁵¹⁰. However, as will be seen below, domestic arbitration laws usually do not go beyond affirming this general principle.

343. The *res judicata* effect of awards is provided for expressly in the arbitration laws of some civil law countries, *e.g.* France⁵¹¹, Belgium⁵¹², the Netherlands⁵¹³, Austria⁵¹⁴ and Spain⁵¹⁵. In Germany, the arbitration law provides that arbitral awards have the same effect between the parties as a final and binding court decision⁵¹⁶, and in Switzerland an award is final from the time when it is notified⁵¹⁷.

344. While in common law countries arbitration laws may not always provide expressly for the *res judicata* effect of arbitral awards, it will be seen below that in England and the United States awards are generally considered to have *res judicata* effect⁵¹⁸. The courts in India, Australia and New Zealand have also confirmed that awards have *res judicata* effect⁵¹⁹.

345. The UNCITRAL Model Law on International Commercial Arbitration also considers arbitral awards to have *res judicata* effect by providing that awards shall be recognised as binding.

346. The following analysis will examine in more detail the arbitration laws of

⁵¹⁰ SHEPPARD, *The Scope and Res Judicata Effect of Arbitral Awards*, p. 275; HANOTIAU, *Complex Arbitrations*, para. 538; RUBINO-SAMMARTANO, pp. 787 *et seq.* See also LEW/MISTELIS/KRÖLL, paras 24-1 *et seq.*

⁵¹¹ Article 1476 NCPC (Article 1484 Decree 2011-48).

⁵¹² Article 1703 (1) Judicial Code.

⁵¹³ Article 1059 Netherlands Arbitration Act 1986.

⁵¹⁴ Article 607 Austrian Arbitration Act 2006.

⁵¹⁵ Article 43 Spanish Arbitration Act 2003.

⁵¹⁶ Article 1055 ZPO. A similar provision is contained in Article 31 of the Brazilian Arbitration Law 9.307 of 1996.

⁵¹⁷ Article 190 (1) PILA.

⁵¹⁸ BORN, pp. 2895 and 2904 *et seq.*; COE, p. 299.

⁵¹⁹ ILA, *Interim Report*, p. 11.

England (2.1.1.1.), the United States (2.1.1.2.), France (2.1.1.3.) Switzerland (2.1.1.4.), as well as the UNCITRAL Model Law (2.1.1.5.).

2.1.1.1. *England*

347. In England it has long been established that the doctrine of *res judicata* applies to arbitral awards⁵²⁰. It has been held since at least 1783 that awards can justify a plea of cause of action and issue estoppel⁵²¹.

348. The English Arbitration Act 1996 does not contain a provision providing that awards have *res judicata* effects just like court judgments⁵²². However, Section 58 (1) of the English Arbitration Act 1996 provides that awards are final and binding:

“Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them”.

349. English courts have since long held that awards are final and binding on the parties and operate in the same way between them as court judgments⁵²³. It is considered that the traditional doctrine of *res judicata* applies to arbitration as it does to litigation⁵²⁴. There must be a final award on the merits pronounced by a tribunal of competent jurisdiction. In addition, the award must be rendered or recognised in England⁵²⁵.

350. Like a judgment, an award extinguishes an earlier cause of action. The extinguished claim is merged into the award and the winning party’s rights are replaced by the right to seek enforcement of the award⁵²⁶. Either party is thus prevented from

⁵²⁰ BEELEY/SERIKI, p. 111.

⁵²¹ ILA, *Interim Report*, p. 10 with reference to *Doe d Davy v Haddon* (1783) 3 Doug KB 310. See also *Cummings v Heard* (1869) LR 4 QB 669, 672.

⁵²² SCHLOSSER, *Arbitral Tribunals or State Courts – Who Must Defer to Whom?*, p. 21; BORN, p. 2904.

⁵²³ MERKIN, para. 18.128 with reference to *Pitcher v Rigby* (1821) 9 Price 79; *Imperial Gas Light & Coke Co v Broadbent* (1859) 7 HL Cas 600; *Caledonian Railway Co v Turcan* [1898] AC 256.

⁵²⁴ JOSEPH, para. 15-70; HANOTIAU *Complex Arbitrations*, para. 540. See also Lord Denning M R in *Fidelitas Shipping Co. Ltd. v V/O Exportchleb* [1966] 1 QB 630, 641 (“Like principles [*i.e.* cause of action and issue estoppel] apply to arbitration”).

⁵²⁵ ILA, *Interim Report*, p. 10.

⁵²⁶ MERKIN, para. 18.128; BORN, p. 2905 with reference to *FJ Bloemen Pty Ltd v Council of the City of Gold Coast* [1973] AC 115, PC.

pursuing the decided claim again at a later stage of the arbitration or in new proceedings⁵²⁷. The parties cannot assert or deny the existence or non-existence of the claim in subsequent proceedings⁵²⁸.

351. English courts apply the doctrine of cause of action estoppel narrowly. They apply it only where the same claim (requiring the same elements of proof) is applied to the same facts and where the same time period is involved⁵²⁹. Cause of action estoppel applies only to claims actually referred to arbitration; the original cause of action remains in existence with regard to all matters excluded from a prior arbitral tribunal's jurisdiction⁵³⁰. In addition, declaratory awards do not extinguish the original cause of action and do not confer any right of enforcement on the winning party. If the losing party does not comply with the award, the winning party will have to bring separate judicial proceedings on the original cause of action, relying on the award as conclusive evidence of his right⁵³¹.

352. An award may give rise to issue estoppel in subsequent proceedings. The award is binding with respect to issues that were necessarily resolved by the award; the parties cannot contradict the earlier findings of the tribunal on these issues in subsequent proceedings⁵³². The applicability of the traditional doctrine of issue estoppel to awards was confirmed by Diplock LJ in *Fidelitas Shipping Co. Ltd. v V/O Exportchleb*:

“Issue estoppel applies to arbitration as it does to litigation. The parties having chosen the tribunal to determine the disputes between them as to their legal rights and duties are bound by the determination by that tribunal of any issue which is relevant to the decision of any dispute referred to that

⁵²⁷ SUTTON/GILL, para. 6-176 with reference to *Westland Helicopters Ltd v Al-Hejailan* [2004] 2 Lloyd's Rep. 523; *Fidelitas Shipping Co. Ltd. v V/O Exportchleb* [1965] 1 Lloyd's Rep. 223, CA; *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep. 428; *Noble Assurance Co. v Gerling-Konzern General Insurance Co* [2007] EWHC 253. See also MUSTILL/BOYD, p. 409 and MUSTILL/BOYD, *Companion*, paras 409-414, p. 209.

⁵²⁸ SUTTON/GILL, para. 6-176; MUSTILL/BOYD, p. 409 and MUSTILL/BOYD, *Companion*, paras 409-414, p. 209.

⁵²⁹ BORN, pp. 2905 *et seq.* with reference to *Henry Boot Constr. Ltd v Alstom Combined Cycles Ltd* [2005] EWCA Civ. 814, CA; *Soteriou v Ultrachem* [2004] All ER (D) 278 (Apr.) (QB).

⁵³⁰ MERKIN, para. 18.129; SUTTON/GILL, para. 6-177.

⁵³¹ MERKIN, para. 18.130; SUTTON/GILL, para. 6-177.

⁵³² MERKIN, para. 18.132; SUTTON/GILL, para. 6-176; MUSTILL/BOYD, p. 413 and MUSTILL/BOYD, *Companion*, paras 409-414, p. 209.

tribunal”⁵³³.

353. The doctrine of issue estoppel is subject to exceptions. If it is shown by subsequent legal developments in other cases that the award was wrong as a matter of law, the award will not give rise to issue estoppel. However, the award will remain final and binding between the parties with regard to the dispute referred⁵³⁴.

354. The question whether the rule in *Henderson v Henderson* applies to awards is controversial. According to Mustill and Boyd

“[...] it is doubtful whether the rule in *Henderson v Henderson* applies to issues which are outside the scope of the matters referred to the arbitrator even though they fall within the terms of the arbitration agreement”⁵³⁵.

355. According to Veeder the rule in *Henderson v Henderson* should not apply to awards in England because it would be illogical to consider the absence of a decision and reasons in a first award as a ground for refusing new arguments in subsequent proceedings⁵³⁶.

356. However, several commentators have suggested that the rule in *Henderson v Henderson* may apply to awards under English law⁵³⁷.

357. English courts have not so far considered whether the rule in *Henderson v Henderson* applies to arbitral awards. In *Aegis v European Re* the Privy Council held that it “may fall on the other side of the line”⁵³⁸, but ultimately did not decide the matter as the

⁵³³ *Fidelitas Shipping Co. Ltd. v V/O Exportchleb* [1966] 1 QB 630, 644. See also *People’s Insurance Company of China, Hebei Branch; China National Feeding Stuff Import/Export Corporation v Vysantbi Shipping Co. Ltd. (The “Joanna v”)* [2003] 2 Lloyd’s Rep. 617, 628; *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041, 1049 (“The [first] award has conferred upon [European Re] a right which is enforceable by later pleading an issue estoppel. It is a species of the enforcement of the rights given by the [first] award just as much as would be a cause of action estoppel”); *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and another (No 2)* [2006] EWCA Civ 1529.

⁵³⁴ MERKIN, para. 18.132.

⁵³⁵ MUSTILL/BOYD, p. 413 and MUSTILL/BOYD, *Companion*, paras 409-414, p. 209.

⁵³⁶ VEEDER, p. 75. See also BARNETT, pp. 225 *et seq.*; ILA, *Interim Report*, p. 11.

⁵³⁷ See, e.g., SUTTON/GILL, para. 6-176 with reference to, *inter alia*, *Henderson v Henderson* (1843) 3 Hare 100; *Fidelitas Shipping Co. Ltd. v V/O Exportchleb* [1965] 1 Lloyd’s Rep 223, CA and *Arnold v National Westminster Bank* [1991] 3 All E R 41, fn 56 and 57; MERKIN, para. 18.132.

⁵³⁸ Para. 16.

question was irrelevant to its decision⁵³⁹.

358. As a general rule, under English law awards take effect from the date upon which they are made⁵⁴⁰. Awards are generally only effective with regard to the parties and any persons claiming through or under them⁵⁴¹. This is the case even if the parties to the arbitration have agreed that the award should bind third parties⁵⁴². However, a third party may agree to be bound by an award⁵⁴³.

359. In *Sun Life Assurance Co of Canada v The Lincoln National Life Insurance Co* the question arose whether an award may be conclusive as between a party to the award and a third party who seeks to rely on it⁵⁴⁴. The Court of Appeal confirmed the applicability of the mutuality doctrine: under English law a party may not rely in subsequent proceedings on a prior award to which it was not a party⁵⁴⁵.

2.1.1.2. *United States*

360. In the United States there is no federal statute providing for any *res judicata* effect of awards. The FAA does not even state that awards are binding upon the parties. However, both claim and issue preclusion are generally considered to apply with respect to awards⁵⁴⁶.

361. Awards have *res judicata* effects before and after they have been confirmed by a court⁵⁴⁷. If an award is confirmed by a court under the FAA it becomes a judgment of the court and acquires the same preclusive effects as any other civil judgment of a US federal district court. Such a judgment is also entitled to recognition and preclusive

⁵³⁹ *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Company of Zurich* [2003] 1 WLR 1041, 1050.

⁵⁴⁰ SUTTON/GILL, para. 6-164.

⁵⁴¹ Section 58 (1) EAA 1996. See also *Gbangbola v Smith and Sherriff Ltd* [1998] 3 All ER 730, 738 (“That finding is by virtue of section 58(1) of the Arbitration Act final and binding on the parties if not challenged (and it has not been) and it is binding on the arbitrator as much as the parties”).

⁵⁴² TWEEDDALE/TWEEDDALE, para. 30.18; HARRIS/PLANTEROSE/TECKS, p. 280.

⁵⁴³ SUTTON/GILL, para.6-183.

⁵⁴⁴ See BEELEY/SERIKI, pp. 111 *et seq.*

⁵⁴⁵ *Sun Life Assurance Co of Canada v The Lincoln National Life Insurance Co* [2005] 1 Lloyd's Rep. 606, 630-31.

⁵⁴⁶ BORN, p. 2895; COE, p. 299; LOWENFELD, p. 56; HANOTIAU, *Complex Arbitrations*, para. 540; SHELL, pp. 640 *et seq.*; ILA, *Interim Report*, p. 12.

⁵⁴⁷ BORN, p. 2895; SHELL, pp. 642 *et seq.*

effects in other states under the federal Full Faith and Credit Statute⁵⁴⁸. This means that a judicially confirmed award is *res judicata* to the same extent in all states of the United States⁵⁴⁹.

362. Unconfirmed awards are not covered by the federal Full Faith and Credit provisions, which deal with the preclusive effects of federal judgments, or by general rules of preclusion applicable to court judgments⁵⁵⁰. In *McDonald v City of West Branch* the US Supreme Court decided that federal courts are not required by statute to give *res judicata* effects to an unconfirmed award. It also stated that any rule of preclusion for unconfirmed awards is necessarily judicially-fashioned⁵⁵¹.

363. The starting point for such judicially-fashioned preclusion rules for arbitral awards has been US *res judicata* standards developed for judgments⁵⁵². This is reflected in the Restatement of the Law (Second) of Judgments which states in § 84 (1):

“[...] a valid and final award by arbitration has the same effects under the rules of *res judicata*, subject to the same exceptions and qualifications, as a judgment of a court”.

364. The application of judicially-fashioned preclusion rules to awards appears widely established in the case law of US courts⁵⁵³. US courts generally apply the traditional doctrines of claim and issue preclusion in cases where a party attempts to re-litigate a claim or issue already determined in a prior arbitral award⁵⁵⁴. It has however been observed that this practice is “less the result of any principled analysis of arbitral

⁵⁴⁸ BORN, pp. 2895-96; SHELL, p. 643. See 28 USC §1738 (1964) (“Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken”); Article VI, Section 1 US Constitution (“Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state”); ALL, *Restatement (Second), Judgments*, § 18, pp. 155-56.

⁵⁴⁹ *Magnolia Petroleum Co. v Hunt*, 320 US 430, 438 (1943) (“From the beginning this Court [the US Supreme Court] has held that these provisions [Article VI, Section 1 US Constitution and 28 USC §1738] have made that which has been adjudicated in one state *res judicata* to the same extent in every other”).

⁵⁵⁰ BORN, p. 2896.

⁵⁵¹ *McDonald v City of West Branch*, 466 US 284, 288 (1984).

⁵⁵² BORN, p. 2897.

⁵⁵³ See BORN, p. 2897 with reference to, *inter alia*, *MACTEC Inc. v Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005); *Greenblatt v Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir. 1985). See also *Manion v Nagin*, 394 F.3d 1062, 1067 (8th Cir. 2005) (“An arbitration award counts as a final judgment for collateral estoppels”); HULBERT, pp. 174 *et seq.*

⁵⁵⁴ See BORN, pp. 2897-98; SHELL, pp. 640 *et seq.*

preclusion than of the largely irreflective extension of judicially fashioned preclusion doctrine to the arbitral context”⁵⁵⁵.

365. US courts have consistently held that a claim previously decided in an award cannot be re-litigated between the same parties. Furthermore, most US courts have held that the doctrine of claim preclusion bars the re-litigation of claims that were not but could and should have been brought in the prior arbitration proceedings⁵⁵⁶. According to the Restatement (Second) of Judgments, if awards “were not treated as the equivalent of a judicial adjudication for purposes of claim preclusion, the obligation to arbitrate would be practically illusory”⁵⁵⁷.

366. § 84 of the Restatement (Second) contains exceptions to the general applicability of the doctrine of claim preclusion to awards. According to § 84 (2)

“[a]n award by arbitration with respect to a claim does not preclude relitigation of the same or a related claim based on the same transaction if a scheme of remedies permits assertion of the second claim notwithstanding the award regarding the first claim”.

367. This means that where Congress has guaranteed a judicial right of action for a federal claim arbitral awards may not give rise to claim preclusion⁵⁵⁸.

368. § 84 (4) provides that

“[i]f the terms of an agreement to arbitrate limit the binding effect of the award in another adjudication or arbitration

⁵⁵⁵ SANDERS, p. 102. See also SHELL, pp. 658 *et seq.* (“The review of cases [...] demonstrates that the courts have widely applied traditional *res judicata* and collateral estoppel doctrine to cases in which preclusion is asserted on the basis of a prior arbitration award. On the basis of traditional preclusion analysis, courts frequently bar relitigation of both claims and issues previously adjudicated in arbitration. However, courts rarely justify their decision to allow such preclusion. Many opinions imply simply that it is ‘fair’ to limit a litigant to one full hearing on a matter. In essence, the courts seem to feel that arbitration is sufficiently like litigation to apply the same rules of preclusion to both types of proceedings”).

⁵⁵⁶ See BORN, pp. 2897-2898 with reference to *Lewis v Circuit City Stores, Inc.*, 500 F.3d 1140, 1147 (10th Cir. 2007); *Sanders v Washington Metropolitan Area Transit Auth.*, 819 F.2d 1151, 1157 (D.C. Cir. 1987); *Norris v Grosvenor Mktg Ltd*, 803 F.2d 1281, 1286 (2d Cir. 1986); *Rudell v Comprehensive Accounting Corp.*, 802 F.2d 926 (7th Cir. 1986); *Schattner v Girard, Inc.*, 668 F.2d 1366, 1368 (D.C. Cir. 1981); *Sue Klau Enter. Inc. v Am. Fidelity Fire Ins., Co.*, 551 F.2d 882 (1st Cir. 1977).

⁵⁵⁷ ALI, *Restatement (Second), Judgments*, § 84, p. 288.

⁵⁵⁸ BORN, p. 2898.

proceeding, the extent to which the award has conclusive effect is determined in accordance with that limitation”.

369. Accordingly, if the parties exclude the application of the doctrine of claim preclusion in their arbitration agreement, such agreement will be respected and the award will not operate as a *res judicata* in subsequent proceedings⁵⁵⁹.

370. The traditional doctrine of issue preclusion generally also applies to awards⁵⁶⁰. According to the Restatement (Second) of Judgments

“[...] there is good reason to treat the determination of the issues in an arbitration proceeding as conclusive in a subsequent proceeding, just as determinations of a court would be so treated. When arbitration affords opportunity for presentation of evidence and argument substantially similar in form and scope to judicial proceedings, the award should have the same effect on issues necessarily determined as a judgment has”⁵⁶¹.

371. US courts have applied the doctrine of issue preclusion to arbitral awards in cases where the same issue necessary to a dispute’s outcome was already raised and decided in prior arbitration proceedings and where the party against whom issue preclusion is raised had a full and fair opportunity to arbitrate the issue in the arbitration proceedings⁵⁶².

⁵⁵⁹ BORN, p. 2899.

⁵⁶⁰ ALI, *Restatement (Second), Judgments*, § 84 (1); BORN, p. 2899. *Contra*: SANDERS, pp. 101 *et seq.*

⁵⁶¹ ALI, *Restatement (Second), Judgments*, § 84, pp. 289 *et seq.*

⁵⁶² BORN, p. 2899 with reference to, *inter alia*, *Sheinfeld v Leeds*, 201 Fed.Appx. 998, 999-1000 (5th Cir. 2006); *Jacobson v Fireman's Fund Ins. Co.*, 111 F.3d 261, 267-68 (2d Cir. 1997); *Pryner v Tractor Supply Co.*, 109 F.3d 354, 361 (7th Cir. 1997); *Norris v Grosvenor Mktg Ltd*, 803 F.2d 1281, 1286-87 (2d Cir. 1986); *Barnes v Oody*, 514 F.Supp. 23 (E.D. Tenn. 1981); *Maidman v O'Brien*, 473 F.Supp. 25 (S.D.N.Y. 1979). See also *B-S Steel Of Kansas, Inc. v Texas Industries, Inc.*, 439 F.3d 653, 662-667 (10th Cir. 2006). See also *F. Hoffmann-La Roche Ltd. v Qiagen Gaithersburg, Inc.*, 730 F. Supp. 2d 318, 328-329 (S.D.N.Y. 2010). In this case, the District Court for the Southern District of New York was seized of an action to vacate an arbitral award on the ground that the arbitral tribunal had manifestly disregarded the law, namely by disregarding the collateral estoppel effects of a prior ICDR award. The Court held that “an arbitration decision may effect collateral estoppel in a later litigation or arbitration if the proponent can show 'with clarity and certainty' that the same issues were resolved. [...] A party is collaterally estopped if ‘(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.” The Court further held that if the arbitral tribunal had simply ignored the prior ICDR award or even questioned that award’s conclusions, the Court would have serious reservations about the validity of the award in question. However, there is no manifest disregard of the law where the arbitral tribunal had simply erred in its collateral estoppel

372. It has been submitted that the doctrine of issue preclusion is more difficult to apply to awards than the doctrine of claim preclusion. It has been argued that because arbitrators frequently do not explain the basis of their decision it is difficult for a court subsequently seized to determine which issues the arbitrators had to resolve to make their award⁵⁶³. However, most US courts have rejected the argument that procedural differences between arbitration and litigation prevent the application of issue preclusion rules to arbitral awards⁵⁶⁴.

373. There are several exceptions to the general applicability of issue preclusion rules to awards. § 84 (3) of the Restatement (Second) provides:

“A determination of an issue in arbitration does not preclude relitigation of that issue if:

- (a) According preclusive effect to a determination of the issue would be incompatible with a legal policy or contractual provision that the tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question, or with a purpose of the arbitration agreement that the arbitration be specifically expeditious; or
- (b) The procedure leading to the award lacked the elements of adjudicatory procedure prescribed in § 83 (2)”.

374. Furthermore, the Restatement states several circumstances that justify not giving issue-preclusive effects to awards. For instance, the doctrine of issue preclusion should not apply to an award where the arbitration procedure was very informal⁵⁶⁵. Likewise, issue preclusion may be inappropriate with respect to issues of law in cases where arbitrators are allowed to apply principles of law other than those that would be

analysis, namely where the arbitrators had recognized the appropriate governing standard but then erroneously apply that standard to the facts before them.

⁵⁶³ SHELL, pp. 650 *et seq.* See also *Universal Am. Barge Corp v J-Chem, Inc.*, 946 F.2d 1131 (5th Cir. 1991).

⁵⁶⁴ See BORN, pp. 2899-2900 with reference to *In re Khaligh*, 506 F.3d 956, 957 (9th Cir. 2007); *In re Khaligh*, 338 B.R. 817, 828-32 (9th Cir. BAP 2006); *I. Appel Corp. v Katz*, 1999 WL 287370 (S.D.N.Y. 1999); *Sullivan v Am. Airlines, Inc.*, 613 F.Supp. 226, 230-31 (S.D.N.Y. 1985); *Kamakazi Music Corp. v Robbins Music Corp.*, 534 F.Supp. 69, 80-81 (S.D.N.Y. 1982); *Barnes v Oody*, 514 F.Supp. 23, 24-25 (E.D. Tenn. 1981); *U.S. Plywood Corp. v Hudson Lumber Co.*, 127 F.Supp. 489, 494-95 (S.D.N.Y. 1954).

⁵⁶⁵ ALI, *Restatement (Second), Judgments*, § 84, p. 289.

applied by a court adjudicating the same dispute⁵⁶⁶. Furthermore, in accordance with § 84 (4), if the parties provide in their arbitration agreement that the award shall not give rise to issue preclusion such an agreement will be upheld by the courts⁵⁶⁷.

375. In addition, some US courts have refused to give issue-preclusive effects to prior awards where the award was either unreasoned or did not clearly dispose of the factual or legal issues⁵⁶⁸. Further, where non-arbitrable claims are involved, the US Supreme Court has held in *Dean Witter Reynolds, Inc. v Byrd* that “it is far from certain that arbitration proceedings will have any preclusive effect on the litigation of nonarbitrable federal claims”⁵⁶⁹. The Supreme Court further held that federal courts have the discretion to protect federal interests by determining the preclusive effects to be given to an award, including denying any preclusive effects to an award⁵⁷⁰.

376. The Restatement specifies that an award may have preclusive effects in subsequent proceedings only if the award has become final. Whether an award is final shall be determined in accordance with § 13 of the Restatement containing the finality requirements for judgments⁵⁷¹. An award that has been set aside or does not meet the requirements for recognition is not final for purposes of *res judicata*⁵⁷².

377. Finally, as a general rule awards have claim preclusive effects only as to the parties to the arbitration proceedings or their privies. By contrast, US courts have applied the doctrine of issue preclusion to awards also in situations where only the party against whom issue preclusion is raised was a party, or in privity with a party, to the prior arbitration⁵⁷³. However, it has been submitted that even though the offensive

⁵⁶⁶ ALI, *Restatement (Second), Judgments*, § 84, p. 291.

⁵⁶⁷ See BORN, p. 2900.

⁵⁶⁸ BORN, p. 2900.

⁵⁶⁹ *Dean Witter Reynolds, Inc. v Byrd*, 470 US 213, 223 (1985).

⁵⁷⁰ *Ibid.* See also LOWENFELD, pp. 59 *et seq.* Given the diminished role of non-arbitrability of claims in US arbitration law the scope of this exception is small.

⁵⁷¹ ALI, *Restatement (Second), Judgments*, § 84, p. 290.

⁵⁷² BORN, p. 2901.

⁵⁷³ *Witkowski v Welch*, 173 F.3d 192 (3d Cir. 1999); *Ritchie v Landau*, 475 F.2d 151, 155-156 (2d Cir. 1973). In *Steelmet, Inc. v Caribe Towing Corp.* the court admitted the general applicability of “offensive collateral estoppel” to awards (“Offensive use of collateral estoppel is no longer prohibited”). However, the court ultimately denied the application of offensive collateral estoppel on the ground that the burden of proof was allocated differently in the two proceedings (747 F.2d 689, 694 (C.A. Fla. 1984)). See also SHELL, p. 653.

application of issue preclusion to arbitral awards is permitted, US courts are reluctant to extend the preclusive effects of an award beyond the parties to the arbitration proceedings⁵⁷⁴.

2.1.1.3. *France*⁵⁷⁵

378. Article 1476 NCPC provides that an “arbitral award has force of *res judicata* with regard to the dispute it decides at the moment it is rendered”⁵⁷⁶. As *per* Article 1500 NCPC⁵⁷⁷, Article 1476 NCPC applies to “arbitral awards rendered abroad or in international arbitration”.

379. As the wording of Article 1476 NCPC is similar to the wording of Article 480 NCPC⁵⁷⁸, it may be argued that the *res judicata* doctrine applies to awards in essentially the same way as it applies to judgments⁵⁷⁹. The applicability of the *res judicata* doctrine to awards appears to be subject to the same triple identity test⁵⁸⁰ and awards are generally afforded the same preclusive effects as judgments⁵⁸¹. In a decision rendered by the

⁵⁷⁴ BORN, p. 2901 citing *Vandenberg v Superior Court*, 982 P.2d 229, 239 (Cal. Sup. Ct. 1999). The California Supreme Court refused to apply offensive collateral estoppel. However, the court admitted that “[t]he predominant view is that unless the arbitral parties agreed otherwise, a judicially confirmed private arbitration award will have collateral estoppel effect, even in favor of nonparties to the arbitration, if the arbitrator actually and necessarily decided the issue sought to be foreclosed and the party against whom estoppel is invoked had full incentive and opportunity to litigate the matter”. See also *In re Neopharm, Inc. Securities Litigation*, 2007 WL 625533, at *6 (N.D. Ill. 2007) (“Ultimately, the court has discretion in determining whether to apply offensive collateral estoppel, especially based on an unconfirmed arbitration decision”); *Fireman’s Fund Ins. Co. v Cunningham Lindsey Claims Management, Inc.*, 2005 WL 1522783, at *4 (E.D.N.Y. 2005) (“Furthermore, plaintiff hopes to use the Phase II award to make an argument for non-mutual offensive collateral estoppel. And while an arbitration decision’s preclusive effect may be employed in this manner [...], it is significant to note that such a use of collateral estoppel is markedly more difficult to invoke than other applications of the doctrine”).

⁵⁷⁵ On 14 January 2011 the new French arbitration law (*décret no 2011-48 du 13 janvier 2011 portant réforme de l’arbitrage*) was published. The Decree will not enter into force until 1 May 2011 and will not contain any substantial changes with regard to *res judicata*. While this research was conducted under the NCPC of 1981, reference will be made in footnotes to the new provisions in the Decree.

⁵⁷⁶ Article 1484 Decree 2011-48.

⁵⁷⁷ Article 1506 Decree 2011-48.

⁵⁷⁸ Article 480 NCPC states in relevant part: “The judgment which decides in its holdings all or part of the main issue [...] shall from the time of its pronouncement, become *res judicata* with regard to the dispute which it determines”.

⁵⁷⁹ According to JARROSSON (*L’autorité de la chose jugée des sentences arbitrales*), even if the wording of Articles 1476 and 480 NCPC is similar and even if in practice awards generally have the same preclusive effects as judgments, “*chose arbitrée*” and “*chose jugée*” are not identical; the “*chose arbitrée*” of awards presents several particularities relating to the consensual nature of arbitration, the lack of formality in arbitration, and to the fact that awards are not attached to a particular legal order.

⁵⁸⁰ JARROSSON, *L’autorité de la chose jugée des sentences arbitrales*.

⁵⁸¹ JARROSSON, *L’autorité de la chose jugée des sentences arbitrales*; BORN, p. 2907.

Tribunal de grande instance of Chaumont and confirmed by the Cour d'appel of Dijon, it was held that

“An arbitral award is without any doubt a judicial act which is rendered by a private judge to whom the parties have submitted their dispute by mutual agreement and which is given by national law the same effects as a court judgment”⁵⁸².

380. Article 1476 NCPC does not define the term “award” and, hence, does not specify the type of award that may become *res judicata*. The general rule is that all decisions that can be properly qualified as awards may become *res judicata*⁵⁸³. Awards are final decisions of arbitrators on all or part of the dispute submitted to them, whether they concern the merits of the dispute, jurisdiction, or a procedural issue leading them to end the proceedings⁵⁸⁴. Provisional or preliminary awards do not become *res judicata*⁵⁸⁵.

381. The general rule is that the *res judicata* effect of an award extends only to its *dispositif*⁵⁸⁶. However, unlike Article 480 NCPC, Article 1476 NCPC does not provide that the dispute is determined in the *dispositif* of the award. Likewise, Article 1471 NCPC⁵⁸⁷ does not require that the award pronounces the arbitrators’ decision in the

⁵⁸² Tribunal de grande instance de Chaumont, 31 January 2002/Cour d’appel de Dijon, 23 April 2002, JDI, Vol. 2 (2003), pp. 459 *et seq.* (original French version).

⁵⁸³ JARROSSON, *L’autorité de la chose jugée des sentences arbitrales*.

⁵⁸⁴ FOUCHARD/GAILLARD/GOLDMAN, para. 1353; JARROSSON, *L’autorité de la chose jugée des sentences arbitrales*, with reference to case law under fn 62.

⁵⁸⁵ HASCHER, p. 28; SHEPPARD, *The Scope and Res Judicata Effect of Arbitral Awards*, p. 279; Cour d’appel de Paris, 29 April 2003, *Société nationale des pétroles du Congo v Société Total Fina Elf E&P Congo*, JDI, Vol. 2 (2004), pp. 511 *et seq.* The Cour d’appel held that the ICC pre-arbitral referee procedure does not qualify as an arbitration procedure. Provisional measures issued by a pre-arbitral referee are of contractual nature and only have “*autorité de la chose convenue*”. See also Cour de cassation, 28 October 1987, *SARL Bureau Qualitas et Conte v Viet et Boudy*, Rev. arb., No. 1 (1988), pp. 149 *et seq.* The court held that the *res judicata* effect of an award may not extend to issues decided in the award, and even the *dispositif*, that do not relate to the dispute between the parties. The *res judicata* effect of an award does not cover the amount of the arbitrators’ fees fixed in the award, because it is not part of the subject matter in dispute between the parties. See also *S.A.J. & P. Avax v Société Tecnimont SPA AS*, Reims Cour d’Appel, Case No. 10/02888, 2 November 2011. The Cour d’Appel of Reims held that a decision by the ICC dismissing a request for challenging the chairman of an arbitral tribunal is an administrative decision without *res judicata*. In addition, the Court held that a challenge of an arbitrator before an arbitration institution and the review of an award before a supervisory court in annulment proceedings do not have the same object.

⁵⁸⁶ See, e.g., Cour de cassation, 26 January 2011, *L’Institut national de la santé et de la recherche médicale (INSERM) v Fondation Letten F. Saugstad*, no. 09-10.198; Cour d’appel de Paris, 28 February 2008, *Société Lin Hidravlika DOO c SA Diebolt*, Rev. arb., No. 4 (2008), pp. 712 *et seq.* See also JARROSSON, *L’autorité de la chose jugée des sentences arbitrales*.

⁵⁸⁷ Article 1482 Decree 2011-48.

form of a *dispositif*. Hence, awards need not necessarily contain a *dispositif*. Accordingly, the Cour de cassation has held that *res judicata* effects should be given to the arbitral tribunal's determinations, even if formally contained in the reasoning of the award, where the tribunal, after having analysed a given issue, has clearly rendered a decision on the issue⁵⁸⁸.

382. French law grants awards substantially the same preclusive effects as judgments. With regard to the negative *res judicata* effect, it is clear that a valid award bars subsequent proceedings against the same opponent seeking the resolution of the same dispute based on the same grounds⁵⁸⁹.

383. Awards seem to bar subsequent proceedings between the same parties even with regard to issues that were not, but could and should have been brought in the first arbitration⁵⁹⁰. This is suggested by the decision of the Cour d'appel of Paris in *SA Thalès Air Défense v GIE Euromissile*⁵⁹¹. The Cour d'appel held that considerations of procedural good faith and honesty may bar a party from raising issues in subsequent arbitration proceedings that were not, but could and should have been raised in the first arbitration proceeding. Akin to the English rule in *Henderson v Henderson*, the Cour d'appel did not find this principle on *res judicata* but on good faith and honesty in proceedings⁵⁹².

384. In line with the decision in *Thalès*, the Cour de cassation confirmed that the principle of concentration of claims should apply in international arbitration. It thereby extended its jurisprudence in *Cesareo* to international arbitration. In *Sté G. et A.*

⁵⁸⁸ Cour de cassation, 25 March 1999, *Acquier v Faure*, Rev. arb., No. 2 (1999), pp. 311 *et seq.* See also Cour d'appel de Pau (Ch. 2, sect. 1), 22 February 2011, *Société Carrefour proximité France v SARL Falco et fils* (Rev. Arb., No. 1 (2011), p. 288) ("Il en résulte que l'autorité de la chose jugée ne se concentre pas dans le dispositif de la sentence mais que partie du dispositif peut être disséminé dans les motifs. En matière arbitrale, il convient de retenir une conception large de l'autorité de la chose jugée").

⁵⁸⁹ Cour d'appel de Paris, 18 December 1985, *X v A et autres*, Rev. arb., No. 2 (1988), p. 330.

⁵⁹⁰ See JARROSSON, *L'autorité de la chose jugée des sentences arbitrales*.

⁵⁹¹ Cour d'appel de Paris, 18 November 2004, *SA Thalès Air Défense v GIE Euromissile*, Rev. arb., No. 3 (2005), pp. 751 *et seq.*

⁵⁹² See Rev. arb., No. 3 (2005), p. 533 ("Considérant que si la loyauté et la bonne foi procédurale dans l'arbitrage international imposent bien aux parties de faire connaître leurs demandes le plus tôt possible, et notamment au stade de l'acte de mission où sont récapitulées les prétentions sur lesquelles portera l'instruction de manière à éviter qu'une demande qui aurait pu et dû être soulevée ne le soit par la suite dans un but dilatoire ou par simple négligence, la question de la sanction de cette obligation de concentrer les demandes dans la même instance se pose pour un second procès au fond devant l'arbitre [...]").

Distribution SARL v Sté Prodim SAS the Cour de cassation, based this time on *res judicata*, held that a claimant must present all his claims arising out of the same set of facts when bringing an action⁵⁹³. While this decision concerned a domestic arbitration, the same solution should apply in an international arbitration pursuant to Article 1500 NCPC.

385. With regard to the positive *res judicata* effect of awards, it is considered that a party may invoke a prior award in subsequent court or arbitration proceedings and request that the determinations of the prior award be implemented in the decision of the second court or arbitral tribunal⁵⁹⁴.

386. Awards become *res judicata* the moment they are rendered. However, French law has yet to define when an international award is ‘rendered’⁵⁹⁵. If the award is set aside or refused recognition or enforcement the award cannot have *res judicata* effects in France⁵⁹⁶.

387. Article 1476 NCPC is mandatory as it concerns the functioning of the French judicial system. Hence, the parties may not exclude the *res judicata* effect of awards under French arbitration law⁵⁹⁷.

388. Awards rendered in violation of the doctrine of *res judicata* may be challenged on various grounds under Article 1502 NCPC⁵⁹⁸:

389. Parties may invoke Article 1502 (1) NCPC claiming that the arbitrators

⁵⁹³ Cour de cassation, 28 May 2008, *Sté G. et A. Distribution SARL v Sté Prodim SAS*, Rev. arb., No. 3 (2008), pp. 461 *et seq.* The Cour d’appel de Paris confirmed this decision in Cour d’appel de Paris, 18 March 2010, *Société Prodim S.A.S v Société G et A Distribution*, Rev. arb., No. 2 (2010), pp. 345 *et seq.* See also Cour d’appel de Pau, 22 February 2011, *Société Carrefour proximité France v SARL Falco et fils* (Rev. Arb., No. 1 (2011), p. 287) (“*l’appelante ne peut ignorer qu’il incombe au demandeur de présenter dans la même instance toutes les demandes fondées sur la même cause et qu’il ne peut invoquer dans une instance postérieure un fondement juridique qu’il s’était abstenu de soulever en temps utile*”).

⁵⁹⁴ TRAIN, *L’autorité positive de la sentence arbitrale*, p. 115. JARROSSON, *L’autorité de la chose jugée des sentences arbitrales*; PINNA, para. 7.

⁵⁹⁵ BENSAUDE, *French Code of Civil Procedure*, p. 892.

⁵⁹⁶ DELVOLÉ/POINTIN/ROUCHE, para. 341; FOUCHARD/GAILLARD/GOLDMAN, para. 1419; ROBERT, para. 316. Tribunal de commerce de Nanterre, 5 September 2001, *Société Technip France v Société Banque extérieure d’Algérie et autres*, Rev. arb., No. 2 (2002), pp. 455 *et seq.*

⁵⁹⁷ FOUCHARD/GAILLARD/GOLDMAN, para. 1419.

⁵⁹⁸ See HASCHER, pp. 28 *et seq.*; JARROSSON, *L’autorité de la chose jugée des sentences arbitrales*. See also PINNA, paras 41 *et seq.*

rendered an award in the absence of an arbitration agreement⁵⁹⁹. Because an arbitral tribunal is rendered *functus officio* once the award is rendered, the tribunal lacks jurisdiction to reconsider a same dispute. If the tribunal reconsiders the same dispute in violation of *res judicata*, it acts without jurisdictional basis and the award may be challenged⁶⁰⁰.

390. The parties may rely on Article 1502 (3) NCPC claiming that the arbitral tribunal did not render its award in accordance with the mandate conferred upon it⁶⁰¹. The arbitrators violate their mandate if they reconsider a matter that has already been settled in a prior award⁶⁰² or judgment⁶⁰³.

391. The parties may invoke Article 1502 (4) NCPC claiming that the arbitral tribunal violated their right to be heard in contradictory proceedings⁶⁰⁴. This may be the case where an arbitral tribunal refuses to decide a matter or accept new evidence on the grounds that the matter was already finally decided, if that matter was not distinctly raised and determined in the prior proceedings⁶⁰⁵.

392. Finally, the parties may invoke Article 1502 (5) NCPC claiming that an award rendered in violation of the doctrine of *res judicata* is contrary to public policy⁶⁰⁶. In France a mere violation of the doctrine of *res judicata* generally is not contrary to public policy⁶⁰⁷. For there to be a violation of public policy, an award must be irreconcilable

⁵⁹⁹ Article 1520 (1) Decree 2011-48 now allows setting aside of the award if the tribunal “has mistakenly declared itself to have or not to have jurisdiction”.

⁶⁰⁰ Cour d’appel de Paris, 25 June 1982, *Société Grainex v Société Cargill*, Rev. arb., No. 3 (1983), pp. 344-45. The arbitral tribunal was entitled to accept jurisdiction to reconsider the dispute because the arbitration agreement reserved the right of the parties to resubmit their dispute to arbitration.

⁶⁰¹ Article 1520 (3) Decree 2011-48.

⁶⁰² See, e.g., Cour d’appel de Paris, 2 April 1998, *Société Technip v Société Asmidal*, Rev. arb., No. 4 (1999), pp. 821 *et seq.* The court held that the arbitrators had simply clarified the terms of their prior partial award by designating the issues already decided and the issues not yet decided. In doing so, the arbitrators had not exceeded their mandate (see extract reported by HASCHER, fn 44); Cour d’appel de Paris, 16 February 1995, *Alama El Radi Khalil Ali Darwish v Société Huure Oy*, Rev. arb. (1996), p. 128. (see extract reported by HASCHER, fn 45).

⁶⁰³ See HASCHER, p. 29 with reference to Cour d’appel de Paris, 29 April 1986, *Polyfrance Imma v Sporprom Service BV*; Cour d’appel de Paris, 16 April 1996, *Gally v Fabricated Metal*, Rev. arb., No. 4 (2001), pp. 805 *et seq.*

⁶⁰⁴ Article 1520 (4) Decree 2011-48.

⁶⁰⁵ HASCHER, p. 29 with reference to Cour d’appel of Paris, 12 January 1996, *Gouvernement de l’Etat du Qatar v Crighton Ltd*, Rev. arb., No. 3 (1996), pp. 428 *et seq.*

⁶⁰⁶ Article 1520 (5) Decree 2011-48.

⁶⁰⁷ See, e.g., JAROSSON, *L’autorité de la chose jugée des sentences arbitrales*; HASCHER, p. 29 with reference to

with another award or judgment⁶⁰⁸.

2.1.1.4. *Switzerland*

393. In Switzerland international arbitration is functionally equivalent to litigation, provided it meets certain minimum procedural requirements⁶⁰⁹. Awards are judicial acts and have *res judicata* effect. Article 190 (1) PILA provides that an “award is final from the time when it is communicated” to the parties⁶¹⁰. Finality here is equivalent to *res judicata* effect⁶¹¹.

394. While Swiss law does not define the term “award”, it is generally considered that awards are judicial acts that definitely decide a substantive or jurisdictional controversy. The notion of “award” generally covers full final awards which dispose of the claim in full, as well as partial final awards in which the arbitral tribunal definitely decides a quantitatively limited part of the claim, the remainder being the object of a subsequent award⁶¹². It is not clear whether the notion also covers interim or preliminary awards⁶¹³. While interim awards determine a specific procedural or substantive issue, they do not constitute final decisions on a formal request. They determine a preliminary substantive question (*e.g.* the validity of a contract leaving the issue of termination to a later decision) or a procedural exception (*e.g.* on jurisdiction or the defence of *res judicata*) on the way to the final decision⁶¹⁴. It is clear that mere

case law in fn 56.

⁶⁰⁸ JARROSSON, *L'autorité de la chose jugée des sentences arbitrales* with reference to Cour d'appel de Paris, 10 March 2005, *SA Sucres et denrées v Scté Multitrade Cairo*, Rev. arb. (2006), p. 458. See also Cour d'appel de Paris, 11 May 2006, *Groupe Antoine Tabet v République du Congo*, Rev. arb. (2007), p. 101. The court confirmed that the contradiction of decisions amounts to a violation of public policy, whether the contradiction occurs between awards rendered by different arbitral tribunals or between awards rendered within the same arbitration; Cour d'appel de Paris, 9 September 2010, *Marriott v Jnab development*, Les Cahiers de l'Arbitrage, Vol. 4 (2010), pp. 1171 *et seq.*

⁶⁰⁹ BERTI/SCHNYDER, *ad Art. 190 PILA*, para. 2, p. 571.

⁶¹⁰ According to case law and unanimous legal doctrine, the term “final” in Article 190 (1) PILA implies that an award is both enforceable and has *res judicata* effects by operation of law (See, *e.g.*, BERGER/KELLERHALS, para. 1494a, p. 427; POUURET/BESSON, para. 853, p. 795; DTF 117 Ia 166, c.5a).

⁶¹¹ BUCHER/TSCHANZ, para. 264; VON SEGESSER/SCHRAMM, p. 955.

⁶¹² WIRTH, *ad Art. 188 PILA*, para. 6, p. 534; LALIVE/POURET/REYMOND, *ad Art. 188*, paras 3-4, pp. 405-6.

⁶¹³ *Pro:* WIRTH, *ad Art. 189*, para. 2, p. 546; BUCHER/TSCHANZ, para. 255. See also FOUCHARD/GAILLARD/GOLDMAN, para. 1357.

⁶¹⁴ WIRTH, *ad Art. 188*, paras 7 and 10, pp. 535 and 536; LIEBSCHER, p. 136. On the distinction between full final, final partial and interim awards see also KAUFMANN-KOHLER/RIGOZZI, paras 671a *et seq.*; MÜLLER, pp. 210 *et seq.*; LALIVE/POURET/REYMOND, *ad Art. 188*, paras 3 *et seq.*, pp.

procedural orders and decisions relating exclusively to provisional or conservatory measures are not awards⁶¹⁵.

395. The distinction between final and interim awards is essential. All final awards, but only these, become *res judicata* pursuant to Article 190 (1) PILA⁶¹⁶. Hence, only full final and partial final awards may become *res judicata*, to the exclusion of interim awards⁶¹⁷. Interim awards do not obtain *res judicata* effects, but they are binding on the arbitral tribunal during the further course of the proceedings⁶¹⁸. It is widely accepted that procedural orders and provisional or conservatory measures do not have any *res judicata* effect⁶¹⁹.

396. Awards on jurisdiction may be final if the arbitral tribunal decides that it lacks jurisdiction⁶²⁰. Such negative awards on jurisdiction may have *res judicata* effect⁶²¹. By contrast, an award by which an arbitral tribunal accepts jurisdiction over at least some aspects of the dispute is considered an interim award⁶²². This means that it does not have *res judicata* effect, but is binding on the arbitral tribunal in the ongoing conduct of the arbitration⁶²³. However, positive awards on jurisdiction can (and must) be

405 *et seq.*; POUDRET/BESSON, para. 731. Partial and interim awards may be challenged directly on the grounds of irregular composition of the arbitral tribunal and lack of jurisdiction (Article 190 (2)(a) and (b) PILA). A challenge on other grounds may only be made if the award causes irreparable detriment to the party concerned (DTF 116 II 80; DTF 115 II 288 ; LIEBSCHER, p. 136).

⁶¹⁵ BUCHER/TSCHANZ, para. 255; BESSON, *Swiss Rules of International Arbitration*, ad Art. 32, para. 14, p. 286. However, in one case the Federal Tribunal accepted to deal with a challenge of a decision whereby the arbitral tribunal decided on its competence to repeat parts of the proceedings as one of the arbitrators had been replaced. The Federal Tribunal thus treated the decision as an award (DTF, 14 June 1990, ASA Bulletin, Vol. 12, No. 2 (1994), p. 226).

⁶¹⁶ BERGER/KELLERHALS, paras 1500 *et seq.*; MÜLLER, p. 222; DTF 128 III 191, 194.

⁶¹⁷ DTF 4A_458/2009, 10 June 2010, ASA Bulletin, Vol. 3 (2010), p. 520. The Federal Tribunal confirmed that partial awards bind the arbitral tribunal who has rendered them, as well as the parties to the extent that they have not challenged the partial awards. See also KAUFMANN-KOHLER/RIGOZZI, paras 694c *et seq.*

⁶¹⁸ DTF 128 III 191. See also BERGER/KELLERHALS, para. 1503; CORBOZ, p. 19; WIRTH, *ad Art.* 188, paras 22-23, p. 540; BERTI/SCHNYDER, *ad Art.* 190 PILA, paras 20 and 23, p. 574; MÜLLER, p. 212; BESSON, *Swiss Rules of International Arbitration*, ad Art. 32, para. 18, p. 287; SHEPPARD, *The Scope and Res Judicata Effect of Arbitral Awards*, p. 279.

⁶¹⁹ POUDRET/BESSON, para. 728; OETIKER, *ad Art.* 26, para. 30, p. 239; BERGER/KELLERHALS, para. 1505.

⁶²⁰ BESSON, *Swiss Rules of International Arbitration*, ad Art. 32, para. 9, p. 285; LALIVE/POUDRET/REYMOND, *ad Art.* 188, para. 4, p. 406 ; MÜLLER, p. 229.

⁶²¹ BUCHER/TSCHANZ, para. 276.

⁶²² BESSON, *Swiss Rules of International Arbitration*, ad Art. 32, para. 9, p. 285; GIRSBERGER/VOSER, para. 962.

⁶²³ POUDRET/BESSON, para. 728 and para. 731.

challenged immediately before the Federal Tribunal⁶²⁴. For this reason they are treated like a final award. Unlike other interim awards, a positive award on jurisdiction that was not challenged or was upheld by the Federal Tribunal has conclusive and preclusive effects, akin to *res judicata* effects⁶²⁵.

397. Awards have *res judicata* effect the moment they are notified to the parties⁶²⁶. This *res judicata* effect becomes absolute if the parties do not bring annulment proceedings in a timely manner or if the annulment action is dismissed. The award loses its *res judicata* effects if the award is set aside⁶²⁷.

398. In Switzerland awards have the same *res judicata* effects as judgments⁶²⁸. The positive *res judicata* effect commands that final determinations made in the *dispositif* of the award are binding in subsequent court or arbitration proceedings between the same parties or their successors. The negative *res judicata* effect bars subsequent proceedings in the identical matter⁶²⁹. If an identical action is nevertheless brought within Switzerland, such action would be met by a *res judicata* defence which must be considered *ex officio*. Granting this defence would not entail a lack of jurisdiction of the second court or arbitral tribunal, but would lead to the inadmissibility of the new proceedings⁶³⁰.

399. The *res judicata* effect of an award is limited to its *dispositif*. However, the reasons may be taken into account to determine the exact sense, nature and scope of the award's *dispositif*⁶³¹.

400. An arbitral tribunal sitting in Switzerland violates procedural public policy if it

⁶²⁴ KAUFMANN-KOHLER/RIGOZZI, para. 671e.

⁶²⁵ BERGER/KELLERHALS, para. 655. See also PFISTERER/SCHNYDER, p. 48.

⁶²⁶ Article 190 (1) PILA; BERGER/KELLERHALS, para. 1499; GIRSBERGER/VOSER, para. 1022.

⁶²⁷ BERTI/SCHNYDER, *ad* Art. 190 PILA, para. 8, p. 572.

⁶²⁸ WALTER/BOSCH/BRÖNNIMANN, *ad* Art. 187-Art. 190 (1), p. 204; BERGER/KELLERHALS, para. 1511.

⁶²⁹ BERTI/SCHNYDER, *ad* Art. 190 PILA, paras 9-10, p. 572.

⁶³⁰ DTF, 20 September 2000, *République de Pologne v Saar Papier Vertriebs-GmbH et tribunal arbitral CCI Zurich*, ASA Bulletin 2001, pp. 487 *et seq.*, consid. 3b; BERTI/SCHNYDER, *ad* Art. 190 PILA, para. 12, p. 573; MÜLLER, p. 194. See however DTF 127 III 279 (consid. 2b) where the Federal Tribunal stated that the granting of a *res judicata* defence entails the lack of jurisdiction of the second judge (“*quant à l'autorité de la chose jugée, ce principe interdit au juge de connaître d'une cause qui a déjà été définitivement tranchée; ce mécanisme exclut définitivement la compétence du second juge*”).

⁶³¹ DTF 128 III 191, consid. 4a; MÜLLER, p. 222.

renders an award without taking into account the *res judicata* effect of a prior award or judgment between the same parties, or if it departs in its final award from the findings expressed in a previous partial award deciding a preliminary issue on the merits⁶³².

401. Since the *res judicata* defence may only entail the inadmissibility of new proceedings and not a lack of jurisdiction of the new tribunal, an arbitral tribunal that admits its jurisdiction despite the existence of a prior award or judgment in an identical matter does not violate Article 190 (2)(b) PILA according to which an award may be set aside “where the arbitral tribunal has wrongly declared itself to have [...] jurisdiction”. In such a situation the only possible ground for setting aside the award is a violation of public policy pursuant to Article 190 (2)(e) PILA⁶³³.

402. An arbitral tribunal violates the doctrine of *res judicata* if it reconsiders its award when responding to a request for correction or interpretation of the award. It has been submitted that in such a situation the tribunal exceeds its jurisdiction and a party can request the annulment of the interpretation or correction pursuant to Article 190 (2)(b) PILA⁶³⁴.

403. Finally, while the prevailing view in Switzerland is that the question of the *res judicata* effect of awards is a procedural question, the preclusive effects of a foreign award in Switzerland are not determined exclusively by Swiss law. A foreign award has the effects which it would have under the law of the country where it was rendered, but it may not have further preclusive effects than an award rendered in Switzerland⁶³⁵.

2.1.1.5. *UNCITRAL Model Law on International Commercial Arbitration*

404. The UNCITRAL Model Law adopts the general principle that awards have *res judicata* effect between the parties. Article 35 (1) ML states that “[a]n arbitral award, irrespective of the country in which it was made, shall be recognized as binding [...]”.

⁶³² DTF 4A_490/2009, consid. 2.1; DTF 4P.4/2007, consid. 5.1; DTF 127 III 279, consid. 2b ; DTF 128 III 191, consid. 4a; MÜLLER, pp. 211 *et seq.* and pp. 303 *et seq.*; POUDRET/BESSON, para. 816.

⁶³³ DTF, 20 September 2000, *République de Pologne v Saar Papier Vertriebs-GmbH et tribunal arbitral CCI Zurich*, consid. 3b (cited *supra*, fn 630).

⁶³⁴ VEIT, *ad* Art. 35/36, para. 18, p. 314.

⁶³⁵ PATOCCHI/JERMINI, *ad* Art. 194 PILA, para. 136, pp. 673 *et seq.* See also STAEHELIN/STAEHELIN/GROLIMUND, para. 24, p. 420.

The *travaux préparatoires* specify that the phrase “shall be recognized as binding” refers to the *res judicata* effect of awards.

405. The Model Law leaves many questions open with regard to the *res judicata* effect of awards. The requirements that must be met for an award to become *res judicata*, and the extent of the preclusive effects of an award that is *res judicata* are not specified by either the text of the Model Law or the *travaux préparatoires*. There is no indication as to whether the *res judicata* effect of an award is limited to its *dispositif* or may extend to some of its reasoning.

406. During the elaboration of the Model Law several attempts were made to further define the phrase “shall be recognized as binding”. Several proposals were made to indicate the exact point of time from which an award is binding. The Commission ultimately followed a suggestion made by the Soviet Union regarding the point of time when foreign awards become binding⁶³⁶ stating that

“[a]s regards foreign arbitral awards, that question would have to be answered, in conformity with the rule laid down in article 36(1)(a)(v), by the law of the State in which, or under the law of which, the award was made”⁶³⁷.

407. The question of when a domestic award, *i.e.* an award made in the country where recognition or enforcement is sought, becomes binding was debated by the Commission in connection with Article 31 ML which concerns the form and contents of an award. Three possible dates were suggested: (i) the date the award was made; (ii) the date the award was received by either the party against whom it was being invoked or the last party to receive notification, or (iii) the date the period for setting aside the award expired⁶³⁸. Because no agreement could be reached, no provision specifying the date when an award becomes final was ultimately included.

⁶³⁶ See Sixth Secretariat Note, analytical compilation of government comments, A/CN.9/263 (19 March 1985), reported in HOLTZMANN/NEUHAUS, para. 2, p. 1037.

⁶³⁷ Commission Report, A/40/17 (21 August 1985), reported in HOLTZMANN/NEUHAUS, para. 312, p. 1051.

⁶³⁸ HOLTZMANN/NEUHAUS, *ad* Article 31, para. 35, p. 842. See also Commission Report, A/40/17 (21 August 1985), reported in HOLTZMANN/NEUHAUS, para. 256, p. 865. For the discussion, see Summary Record, A/CN.9/SR.328-.329,.333, reported in HOLTZMANN/NEUHAUS, paras 25 *et seq.*, pp. 857 *et seq.*

408. For the same reason the Model Law does not contain any definition of the term “award” for the purposes of Article 35 (1) or otherwise. Both the Working Group and the Commission considered including a general definition of the term “award” in Article 2 ML. However, no agreement on an acceptable general definition could be reached. The Working Group considered the following proposal:

“‘award’ means a final award which disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal which finally determine[s] any question of substance or the question of its competence or any other question of procedure but, in the latter case, only if the arbitral tribunal terms its decision an award”⁶³⁹.

409. While there was wide support for the first part of the definition (up to the word “substance”) serious concerns were expressed with regard to the second part, in particular the part concerning decisions on questions of procedure. Ultimately, the Working Group decided not to include a definition in the Model Law and invited the Commission to consider the matter. The Commission also left the term undefined⁶⁴⁰.

2.1.2. Institutional Arbitration Rules

410. Many institutional arbitration rules provide that awards are “final and binding” on the parties. For example, Article 34 (2) of the UNCITRAL Arbitration Rules states that

“[a]ll awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay”⁶⁴¹.

411. Article 26 (9) of the LCIA Rules contains a similar rule. Article 26 (7) further specifies that the arbitral tribunal has the power to “make separate awards on different issues at different times” and that such awards “have the same status and effect as any other award made by the Arbitral Tribunal”.

⁶³⁹ Fifth Working Group Report, A/CN.9/246 (6 March 1984), reported in HOLTZMANN/NEUHAUS, para. 192, pp. 164-65.

⁶⁴⁰ HOLTZMANN/NEUHAUS, *ad* Article 2, pp. 153-54.

⁶⁴¹ An almost identical provision is contained in the ICDR International Dispute Resolution Procedures (Article 27 (1)), the CRCICA Arbitration Rules (Article 32 (2)), the SIAC Arbitration Rules (Article 28.9), the SCC Rules (Article 40) and the Swiss Rules of International Arbitration (Article 32 (2)). See also Article 43 (8) of the CIETAC Arbitration Rules.

412. Variations of the phrase “final and binding” exist in other institutional rules. For example, according to Article 64 (b) of the WIPO Arbitration Rules an award is “effective and binding” on the parties.

413. Some institutional rules use only the word “binding”. For instance, Article 28 (6) of the ICC Rules of Arbitration states that “[e]ach award shall be binding on the parties”⁶⁴².

414. Finally, Article 37 of the Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation states that “[t]he arbitral proceedings shall be terminated with the making of a final award”.

415. While all of these provisions confirm the positive *res judicata* effect of awards, they do not give any guidance with respect to the awards’ negative *res judicata* effect⁶⁴³. However, it has been suggested that by agreeing to arbitration pursuant to such institutional arbitration rules, the parties accept the negative *res judicata* effect of any valid award⁶⁴⁴.

416. Some rules state the date when an award becomes *res judicata*⁶⁴⁵. There appear to be no provisions making any further specifications with regard to the *res judicata* effects of awards; there are no institutional arbitration rules providing any guidance as to how arbitral tribunals should deal with *res judicata* issues, save for general rules prescribing arbitral tribunals to act within the boundaries of their jurisdiction and in accordance with the applicable law⁶⁴⁶.

417. The extent of the *res judicata* effect of awards rendered pursuant to the above institutional rules is not clear. It is not clear whether the *res judicata* effect of such awards is limited to the award’s *dispositif*. Many institutional arbitration rules prescribe that an

⁶⁴² See also Article 51 NAI Arbitration Rules.

⁶⁴³ SHEPPARD, *The Scope and Res Judicata Effect of Arbitral Awards*, p. 277.

⁶⁴⁴ ILA, *Interim Report*, p. 23.

⁶⁴⁵ Articles 51 NAI Arbitration Rules and Article 40 SCC Arbitration Rules provide that an award is binding from the day it is rendered. According to Article 64 (b) of the WIPO Arbitration Rules an award is binding as from the date it is communicated by the Centre.

⁶⁴⁶ ILA, *Interim Report*, p. 23; SHEPPARD, *The Scope and Res Judicata Effect of Arbitral Awards*, p. 277.

award shall state the reasons upon which it is based⁶⁴⁷. It has been submitted that with regard to awards rendered under such institutional rules, the reasons necessary to the award's *dispositif* should be covered by its *res judicata* effect. Further, it has been suggested that future versions of these rules could expressly implement the doctrine of issue estoppel by prescribing that the parties are presumed to have agreed to be bound in subsequent proceedings by the reasons which form the necessary basis of the *dispositif*⁶⁴⁸.

2.1.3. International Commercial Arbitration Conventions

418. There are several international conventions on international commercial arbitration, most importantly the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which is one of the most widely accepted international conventions. Given its importance, the primary focus of the following analysis will be on the New York Convention.

2.1.3.1. 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards

419. Article III of the New York Convention prescribes that “[e]ach Contracting State shall recognize arbitral awards as binding [...]”. This simply confirms the general principle that arbitral awards have *res judicata* effect. However, the New York Convention does not provide a definition of the types of awards that must be recognised as binding. Furthermore, Article III does not expressly prescribe any particular rules of *res judicata*.

420. According to Born, the New York Convention must be understood as prescribing international standards that ensure the binding character of awards and that preclude national courts from denying *res judicata* effects to arbitral awards⁶⁴⁹. In

⁶⁴⁷ See, e.g., Article 25 (2) ICC Arbitration Rules ; Article 34 (3) UNCITRAL Arbitration Rules; Article 27 (2) ICDR International Dispute Resolution Procedures; Article 26 (1) LCIA Arbitration Rules; Article 32 (3) CRCICA Rules; Article 36 (1) SCC Arbitration Rules; Article 32 (3) Swiss Rules.

⁶⁴⁸ VEEDER, pp. 78 *et seq.*; ILA, *Interim Report*, p. 23.

⁶⁴⁹ BORN, p. 2890 (“Where the parties have agreed to resolution of their disputes in a single, centralized forum, specifically to avoid the costs and delays of multiplicitous litigations in national courts, the Convention’s requirement that Contracting States recognize such agreements, and the resulting awards, implies even broader principles of preclusion than national court judgments which rest on a structural premise of multiple possible forums and proceedings. The precise contours of the international

particular, Article III “provides for a broad, constitutional statement of principle that must be elaborated by national courts and arbitral tribunals”⁶⁵⁰. It requests Contracting States to afford at least the same, and arguably even greater, *res judicata* effects to awards as granted to judgments⁶⁵¹.

421. Born submits that Article III NYC should provide for a broad *res judicata* doctrine, akin to the doctrine known in common law jurisdictions. The *res judicata* effect of the award should cover all claims arising out of a dispute, whether or not they were asserted during the arbitration proceeding. All claims that were within the scope of the arbitration agreement and that were related to the claims asserted in the arbitration should be covered by the *res judicata* effect of the award⁶⁵².

422. While it should generally be possible to interpret Article III NYC in the way suggested by Born, it remains that the wording of the Convention does not prescribe any particular rules of preclusion for international arbitral awards. Furthermore, it is widely considered that the New York Convention does not apply (at least directly) to arbitral tribunals⁶⁵³. Even if its provisions must be considered by arbitral tribunals, the Convention still does not give any guidance to arbitral tribunals as to how to deal with *res judicata* issues, except for requiring them to respect the binding effect of prior awards. Moreover, the Convention does not address the question of the binding effect of prior judgments in arbitral proceedings.

2.1.3.2. *Other multilateral international commercial arbitration conventions*

423. The 1961 European Convention on International Commercial Arbitration does not contain any rule providing for the binding effect of awards. This might be explained

preclusion rules applicable in particular cases is to be developed by national courts in light of general principles of international law and in light of the parties’ expectations. Fundamental to this analysis, however, is the obligation to treat arbitral awards no less favorably, insofar as preclusive effects are concerned, than national court judgments and to give effect to the terms and objectives of the parties’ agreement to arbitrate”).

⁶⁵⁰ BORN, p. 2891.

⁶⁵¹ BORN, p. 2892.

⁶⁵² BORN, pp. 2892 *et seq.* According to BÖRNER (p. 115), Article III may provide for collateral estoppel (“[...] an arbitral award may be seen as having *res judicata* effect on third parties that seek to relitigate the issue resolved by the tribunal, at least until one of the parties to the award succeeds in having the award judicially modified”).

⁶⁵³ See POUURET/BESSION, para. 185.

by the fact that the Convention only sought to supplement the New York Convention⁶⁵⁴.

424. The 1975 Inter-American Convention on International Commercial Arbitration affords awards the same effects as judgments. Article 4 states that

“[a]n arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment”.

425. Similarly, Article 25 of the OHADA Treaty on the Harmonisation of Business Law in Africa provides:

“Award pronounced in compliance with the stipulations provided herein shall have final and conclusive authorities in the territory of each Contracting State as judgments delivered by their national courts”⁶⁵⁵.

426. Finally, the 1987 Amman Arab Convention on Commercial Arbitration does not contain any rule concerning the binding effects of arbitral awards. It only states that the Supreme Court of each contracting State must give leave to enforce to awards of the arbitral tribunal⁶⁵⁶.

2.1.4. International Arbitration “Soft Law”: The ILA Reports and Recommendations on *Res Judicata* and Arbitration

427. As was seen above, based on two reports, in 2006 the ILA adopted six recommendations on *res judicata* for international arbitrators⁶⁵⁷. While it is not yet possible to determine the extent to which the reports and recommendations will establish themselves to supplement existing international arbitration “hard law”, it has been noted that they have been well received by arbitrators as a useful guide to assist them in addressing *res judicata* issues. They have been considered in a number of recent and ongoing cases⁶⁵⁸. The ILA reports and recommendations will be discussed in

⁶⁵⁴ LEW/MISTELIS/KRÖLL, paras 26-23.

⁶⁵⁵ See also Article 23 of the 1999 OHADA Uniform Act on Arbitration (“As soon as the award is made, the dispute so settled is *res judicata*”).

⁶⁵⁶ Article 35.

⁶⁵⁷ See *supra*, paras 7 *et seq.*

⁶⁵⁸ DE LY/SHEPPARD, p. 2.

further detail in Chapters Five and Six below.

2.1.5. Conclusion

428. As the above review has shown, none of the provisions in domestic arbitration laws, institutional arbitration rules and international arbitration conventions goes beyond stating the general principle that awards are binding upon the parties.

429. Domestic arbitration laws generally do not specify either the requirements that must be met for an award to become *res judicata* or the specific effects of an award that is *res judicata*. National courts in common law and civil law jurisdictions seem to consider awards as equivalent to judgments with respect to *res judicata*⁶⁵⁹ and generally apply very similar *res judicata* rules to awards as those applied to judgments. As a consequence, the doctrine of *res judicata* as applied to awards varies from country to country.

430. National arbitration laws and courts have devoted only little attention to the role of international arbitration conventions, in particular the New York Convention, or other sources of international arbitration law in determining *res judicata* rules for awards⁶⁶⁰. *Res judicata* rules for awards are almost entirely built on domestic litigation rules. While this is understandable, it is surprising given the fact that awards are today rendered and recognised according to international standards⁶⁶¹. It is interesting to note that the transposition of domestic litigation rules to awards does not appear to have been the result of a thorough analysis of arbitral preclusion. It is often done without examining whether, and to what extent, the analogy between litigation and arbitration is appropriate⁶⁶².

⁶⁵⁹ SHANY, *Competing Jurisdictions*, p. 166.

⁶⁶⁰ BORN, p. 2888.

⁶⁶¹ BREKOULAKIS, p. 207.

⁶⁶² See *supra* para. 364. See also BORN, p. 2916. But see the *Fomento* decision of the Swiss Federal Tribunal. The court first stated the litigation rules of *res judicata* and *lis pendens* and then examined whether different rules should apply where the second court seised is an arbitral tribunal with seat in Switzerland. The Federal Tribunal acknowledged that, given the private nature of arbitration, arbitral tribunals should not always be treated in the same way as state courts. However, it held that since awards may be enforced in the same way as judgments there is a same interest to avoid inconsistent decisions within a same jurisdiction. Further, arbitral tribunals may not invoke their particular nature to avoid applying *res judicata* rules. The court concluded that an arbitral tribunal with seat in Switzerland must apply the same rules as a

431. The analysis of institutional arbitration rules and arbitration conventions has shown that none of these international instruments give any particular guidance to arbitral tribunals as to how to deal with *res judicata* issues arising before them.

432. Arbitral tribunals faced with *res judicata* issues must answer several important questions⁶⁶³. For instance:

- Which law governs *res judicata* in international arbitration proceedings?
- Which requirements must be met for the *res judicata* doctrine to apply and how must these requirements be interpreted?
- Which type of decision may operate as *res judicata* in subsequent arbitration proceedings?
- Is it necessary to determine whether a prior foreign judgment or award may be recognised or enforced at the place of arbitration?
- To what extent should reasons be given *res judicata* effect?
- Should a party be precluded from raising issues that were not, but could and should have been brought in the prior proceedings?
- Even if a prior award or judgment meets all the requirements for having *res judicata* effect, are there any exceptional circumstances preventing the application of *res judicata*?
- What effects may be given to a prior award or judgment that does not have *res judicata* effect?

433. International arbitration law does not give answers to any of these questions. Domestic rules of *res judicata* designed for litigation are the most detailed set of rules. Extended to awards they provide answers to some of the questions raised above. However, the appropriateness of applying domestic litigation rules of *res judicata* in

Swiss court placed in the same situation (DTF 127 III 279, consid. 2c).

⁶⁶³ See SHEPPARD, *Res judicata and estoppel*, pp. 229 *et seq.* See also ILA, *Interim Report*, pp. 25 *et seq.*

international arbitration is uncertain. This question will be examined in the following chapter of this research.

434. The question that arises now is how arbitral tribunals currently deal with *res judicata* issues in the absence of any particular rules provided by international arbitration law. It is necessary to examine arbitration case law to look for an established arbitration practice or trend among arbitral tribunals that might fill some of the gaps left open by international arbitration law.

2.2. International Commercial Arbitration Practice

435. There are only a few published awards in which the *res judicata* effects of a prior judgment or award were considered by an arbitral tribunal. On several occasions only extracts of the award were published making it impossible to define the precise situation in which the *res judicata* issue arose or to draw meaningful conclusions as to how the arbitral tribunal dealt with the *res judicata* issue. From the review of arbitration case law it did not emerge that arbitrators make a distinction as to whether a prior decision was a judgment or an award. By contrast, arbitrators seem to treat judgments and awards alike for purposes of *res judicata*. For this reason, the analysis below will not draw this distinction.

436. The general result of the review of arbitration case law is that no established practice or trend may be discerned from publicly available awards with respect to most *res judicata* questions. Like international arbitration law, arbitration practice does not go much further than affirming the general principle that awards have *res judicata* effects. This principle is well-established in practice. It also appears well-established that the doctrine of *res judicata* applies only where the triple identity test is met. However, there is disagreement on how to interpret the notions of parties, cause and object.

437. Some of the most relevant awards with regard to *res judicata* will be examined below. This will show that different arbitral tribunals have dealt with *res judicata* issues differently; proposing different solutions to identical problems.

438. First, the review will investigate which law or rules of law arbitral tribunals have

applied to *res judicata* issues (2.2.1.). It will then look at the requirements that have to be met for arbitral tribunals to apply the doctrine of *res judicata* (2.2.2.). Third, it will investigate whether arbitral tribunals have afforded prior decisions broad or narrow *res judicata* effects, including whether arbitral tribunals have given *res judicata* effects only to a prior decision's *dispositif* or also to its reasoning (2.2.3.). Fourth, the analysis will investigate whether there are circumstances in which arbitral tribunals have refused to apply the *res judicata* doctrine, even though the requirements for its application were met (2.2.4.). Finally, it will determine whether and to what extent arbitral tribunals have granted preclusive effects to prior judgments or awards although they did not qualify as *res judicata* (2.2.5.).

2.2.1. Which law governs *res judicata* issues in arbitration proceedings?

439. No clear choice-of-law rule has crystallised from international arbitration practice. Surprisingly, arbitral tribunals have afforded the question of the proper law governing *res judicata* relatively little consideration. If the tribunal determined a particular law or rules of law to govern *res judicata*, it rarely explained the reasons behind its choice-of-law⁶⁶⁴.

440. Most arbitral tribunals applied domestic *res judicata* rules designed for litigation to determine the effects of a prior award or judgment. This is consistent with the origins of preclusion rules in domestic litigation and the application of domestic preclusion rules to awards by state courts⁶⁶⁵. In most cases, the domestic law applied was the law of the place of arbitration⁶⁶⁶. However, the tribunals rarely explained why

⁶⁶⁴ In this sense, see also MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage international*, p. 188.

⁶⁶⁵ BORN, p. 2917. It may also be explained by international arbitrators' reluctance to adopt more innovative solutions (such as the reference to transnational law) whenever they are able to motivate their decisions in more traditional terms, which seem more likely to ensure the awards' enforceability (see LALIVE, *Transnational (or Truly International) Public Policy*, paras 100b *et seq.*).

⁶⁶⁶ HASCHER, p. 18. See also ICC Case Nos 2745 and 2762, 1977 (The arbitral tribunal applied the "French and Belgian notion of *res judicata*". The seat of the arbitration was in France. The first award had also been rendered in France. The arbitral tribunal specified that this choice-of-law was independent of the law governing the merits, which was Belgian law. It seems that the tribunal determined French law to govern *res judicata* as the law of the seat of the arbitration. The tribunal noted that the parties had submitted their dispute to arbitration in France and to French procedural law. It is important to note that in 1977, when the second arbitration took place, in the absence of an express choice of law it was presumed that by choosing France as the arbitral seat the parties also impliedly chose French procedural law. This presumption was abandoned with the law reform of 1981); ICC Case No. 3540, 1988 (reported by HASCHER, p. 18)(After stating that *res judicata* issues are matters of procedure, the arbitral tribunal

they considered the domestic litigation rules of the place of arbitration to be applicable⁶⁶⁷. Arbitral tribunals sometimes invoked the traditional rationale that *res judicata* must be characterised as procedural and, therefore, be governed by the law of the seat⁶⁶⁸.

441. Frequently, the law of the place of arbitration was also the law of the country where the first decision was rendered⁶⁶⁹, the law governing the merits or the law relied upon by the parties⁶⁷⁰. In these cases, it is often impossible to ascertain in which quality the particular law was applied, or whether the tribunal intended to apply one particular law or several different laws cumulatively. In ICC Case No. 7438 of 1994 the arbitral tribunal sitting in Zurich applied the procedural law of the canton of Zurich. The sole arbitrator based its choice-of-law on three considerations. First, the arbitration clause provided for arbitration in Zurich. Second, the agreement concerning the place of arbitration was confirmed in the terms of reference. Third, the seat of the first arbitral tribunal was also in Zurich and the first award was rendered in this city. According to Hascher, the arbitrator's reasoning leads to believe that he intended to apply the law of the place of arbitration and the law of the place where the first award was rendered

applied the law of civil procedure of the canton of Geneva, because there were no *res judicata* rules provided for in neither the ICC Rules nor the Swiss Concordat on arbitration); ICC Case No. 5901, 1989 (reported by HASCHER, p. 19 and GRIGERA NAÓN, pp. 168 *et seq.*)(The arbitral tribunal first stated that *res judicata* was a question of procedure and that before a state court the applicable conflict-of-laws rule would normally designate the *lex fori* to govern *res judicata* issues. The arbitral tribunal then admitted that arbitral tribunals do not have a *lex fori*. Nevertheless, the tribunal applied French law to *res judicata* because it was the law of the seat of arbitration and the award might be challenged before the French courts. The tribunal added that "it is obviously natural to look to the laws of France, particularly since the law of arbitration of France makes specific reference to the '*res judicata*' effects or '*autorité de la chose jugée*' of arbitration awards"); ICC Case No. 7438, 1994 (reported by HASCHER, p. 19); ICC Case No. 8023, 1995 (reported by HASCHER, pp. 21-22)(The arbitral tribunal applied French law which was the law of the seat of arbitration, the law governing the merits and the law relied upon by the parties); CRCICA Case No. 67/1995) (The arbitral tribunal applied the law of the respondent's state, *i.e.* Egyptian law, to *res judicata*. Egypt was the place of arbitration and the place where the first judgment was rendered. In addition, Egyptian law governed the merits. All three arbitrators were of Egyptian nationality); ICC Case 10574, 2000 (reported by GRIGERA NAÓN, p. 171)(The arbitral tribunal sitting in London looked exclusively at section 32 of the 1982 English Civil Jurisdiction and Judgments Act to determine if it would grant *res judicata* effects to a US federal court judgment).

⁶⁶⁷ HASCHER, p. 19.

⁶⁶⁸ See, *e.g.* ICC Case No. 3540, 1988; ICC Case No. 5901, 1989. See also ILA, *Interim Report*, pp. 14 and 26.

⁶⁶⁹ See, *e.g.*, ICC Case Nos 2745 and 2762, 1977; ICC Case No. 7438, 1994; CRCICA Case No. 67/1995.

⁶⁷⁰ ICC Case No. 8023, 1995; CRCICA Case No. 67/1995.

cumulatively⁶⁷¹.

442. In some cases, the arbitral tribunal applied the law governing the merits or the law relied upon by the parties to *res judicata*. However, where the law governing the merits was applied to *res judicata* issues, it is again difficult to ascertain in which quality that law was applied. Indeed, in those cases, either the arbitral seat was also located in the country the law of which had been chosen to govern the merits, or the parties had relied on the law governing the merits in support of their submissions on *res judicata*⁶⁷².

443. The tribunals sometimes reverted to the false conflict technique, demonstrating that their conclusions regarding *res judicata* would have been the same in application of a different legal source. In ICC Case No. 5901 of 1989, the tribunal decided that French law, *i.e.* the law of the seat of the arbitration, should govern the question whether and to what extent a prior Swiss award may have *res judicata* and collateral estoppel effects in a subsequent arbitration with seat in France. The arbitral tribunal added that French *res judicata* rules were entirely consistent with Swiss *res judicata* rules⁶⁷³ and international arbitral precedents applying both civil and common law provisions.

444. Some arbitral tribunals tried to avoid the strict application of domestic *res judicata* rules, seemingly taking into account the autonomous nature of international arbitration. In ICC Case No. 13509 of 2006 the arbitral tribunal, sitting in Paris, held that it had great freedom in determining the law governing *res judicata*. French law would merely constitute a source of inspiration, without being binding upon the tribunal, even though the seat of the arbitration was in France, the first award was rendered in France, the law governing the merits in both arbitrations was French law and both parties to the arbitration relied on French law with regard to *res judicata*. The tribunal noted that, in

⁶⁷¹ HASCHER, p. 19.

⁶⁷² HASCHER, p. 20. See also ICC Case No. 6293, 1990 (reported by HASCHER, p. 20)(The arbitral tribunal referred to Article 28 (6) of the ICC Arbitration Rules but its reasoning is based almost exclusively on New York State law which was the law governing the merits and the only law relied upon by the parties); ICC Case No. 10027, 2000 (reported by HASCHER, p. 20)(The parties agreed that *res judicata* should be governed by the law governing the merits, which was New York law. The arbitral tribunal therefore had to apply the law governing the merits, although it considered *res judicata* to be a matter of procedure rather than substance. In the present case, New York law governed both the merits and the procedure. Hence, the question whether *res judicata* is a matter of procedure or substance was of no practical importance).

⁶⁷³ Swiss law was the law of the place where the first award was rendered and the law governing one of the disputed contracts.

these circumstances, it would be appropriate to look at French rules of *res judicata*, always pointing out that it was not bound by French law on *res judicata*⁶⁷⁴. The tribunal, whose reasoning was based essentially on French law, eventually rejected the *res judicata* argument on the grounds that the requirements for *res judicata* were not met. Furthermore, the tribunal, who was authorised to rule as *amiable compositeur*, specified that its decision was fair and just⁶⁷⁵.

445. Some arbitral tribunals based their solution entirely on international arbitration law. In ICC Case No. 3383 of 1979, when deciding whether the prior award had finally determined that there was a valid agreement providing for *ad hoc* arbitration, the ICC tribunal did not specify the law governing *res judicata*, nor did it base its reasoning on any particular legal basis. Instead, the tribunal based its reasoning entirely on the premise that prior awards must be considered final and binding in subsequent arbitral proceedings, unless successfully challenged before the competent domestic courts. The tribunal granted the prior *ad hoc* award absolute *res judicata* effects:

“[...] it is obviously not for this arbitrator to operate as an appeal body over the decisions of other arbitral tribunals – including those preceding the final award on the merits – which, by definition, are rendered in last instance. Considering, therefore, that where the parties have the power [...] to challenge before the competent authorities arbitral awards which they consider to be flawed, it is not within the powers of another arbitrator to put such awards in question. It is therefore for this arbitrator to simply take notice of the decisions rendered by the *ad hoc* arbitral tribunal [...] in particular the decision in which the arbitral tribunal declared itself competent and accepted the mission conferred upon it by the parties pursuant to the arbitration agreement [...]”⁶⁷⁶.

446. Accordingly, the tribunal held that arbitral tribunals are bound by prior awards,

⁶⁷⁴ ICC Case No. 13509, 2006, p. 1205.

⁶⁷⁵ See also ICC Case No. 8023, 1995 (reported by HASCHER, pp. 21 *et seq.*); ICC Case No. 6293, 1990 (The tribunal referred to Article 28 (6) of the ICC Arbitration Rules which, according to the tribunal, expressed the general principle that arbitral awards have *res judicata* effect). In *Wintershall AG et al v The Government of Qatar* the tribunal referred to Article 1059 of the Netherlands Arbitration Act 1986 to ascertain that partial final awards have *res judicata* effect. It then cited the claimant’s submissions according to which the “principle of *res judicata* prevents the re-opening of necessarily decided points [...]” (para. 83).

⁶⁷⁶ ICC Case No. 3383, 1979, p. 396.

so long as their validity was not challenged before the supervisory courts. It held further that the *ad hoc* tribunal was validly constituted by its own decision to accept jurisdiction and concluded that

“[...] the constitution of this new arbitral tribunal, expressly independent of the ICC Court of Arbitration, is sufficient in itself to permit the conclusion that the original arbitration agreement providing for ICC arbitration was modified”⁶⁷⁷.

447. The tribunal corroborated this conclusion by stressing that the modification of the original arbitration agreement in favour of *ad hoc* arbitration was “above all” the result of the “common intention” of the parties which was unambiguously expressed in the new agreement in which the parties expressly renounced ICC arbitration. The tribunal therefore underlined that the conclusion to grant absolute *res judicata* effect to the prior *ad hoc* award was in line with the parties’ arbitration agreement⁶⁷⁸.

448. The readiness on the part of arbitral tribunals to depart from a mechanical application of domestic *res judicata* rules is further illustrated by ICC Case No. 4126 of 1984. In this case the arbitral tribunal was requested to issue interim relief similar to that which a state court had previously refused to grant. The tribunal first held that the parties in the court proceedings were not identical to the parties in the arbitration. Nevertheless, the tribunal held that

“[...] it is nonetheless the case that the object of the request now advanced before the arbitral tribunal is essentially identical to that judged in that procedure. [...] [The party to both procedures is, therefore,] bound by the decision of the Court of Appeal [...]”⁶⁷⁹.

⁶⁷⁷ *Ibid.*

⁶⁷⁸ See also ICC Case No. 6233, 1992 (reported by HASCHER, p. 21). The arbitral tribunal seemingly relied on the autonomous nature of international arbitration when dealing with *res judicata*. Concerning the law governing the interpretation of prior awards the tribunal held that, even though the seat of the arbitration was in Abidjan, “in light of the autonomy of the arbitral clause”, it would not be appropriate to apply the provisions of the code of civil procedure of the Ivory Coast, which only dealt with the interpretation of judgments, but not awards. It further held that “[t]he arbitral tribunal is of the opinion that arbitral tribunals, and not State courts, have jurisdiction to interpret arbitral awards. This power is based on the arbitral clause itself, the purpose of which is to bar the jurisdiction of State courts; nothing authorizes the limitation of the effects of the arbitral clause when the subject of the dispute is the interpretation of the award rendered on the basis of this clause” (para. 6).

⁶⁷⁹ ICC Case No. 4126, 1984 (English translation quoted by SCHWARTZ, p. 57. See also BORN, p.

449. The tribunal further reasoned that, even if the party identity requirement was not met and, hence, a strict rule of *ne bis in idem* could not apply,

“the rules of good procedural order in an important number of countries including those of the European Communities do not prevent any less a party to an arbitration from availing itself, for a request that is essentially identical and again presented as a request for interim relief [...], of the successive possibilities offered by state jurisdictions [...] without there being an objective change in circumstances”⁶⁸⁰.

450. Finally, in some cases the arbitral tribunal appears to base its conclusions on general *res judicata* principles detached from any particular legal system⁶⁸¹.

451. It has been said that arbitral tribunals - “as law and practice stand today” – must apply the law of the place of arbitration to *res judicata* issues⁶⁸². However, there does not appear to be an established practice among arbitral tribunals to apply the law of the place of arbitration. National arbitration laws are virtually silent with regard to *res judicata*. While it is true that arbitral tribunals have frequently applied the domestic *res judicata* rules of the place of arbitration, several tribunals have applied different laws or rules of law. Furthermore, most arbitral tribunals that have applied *res judicata* rules of the place of arbitration have done so without justifying this choice-of-law. Moreover, the rationale of some tribunals to apply domestic *res judicata* rules of the arbitral seat on the basis that *res judicata* is a procedural matter to be governed by the law of the forum is flawed. It disregards today’s general understanding that international arbitral tribunals have no *lex fori*. Modern arbitration laws have generally abandoned the presumption

2918).

⁶⁸⁰ *Ibid.* See also ICC Case No. 3267, 1984, p. 89 (“[T]he binding effect of its first award is not limited to the contents of the order thereof adjudicating or dismissing certain claims, but that it extends to the legal reasons that were necessary for such order, *i.e.* to the *ratio decidendi* of such award. Irrespective from the academic views that may be entertained on the extent of the principle of *res judicata* on the reasons of a decision, it would be unfair to both parties to depart in a final award from the views held in the previous award, to the extent they were necessary for the disposition of certain issues”).

⁶⁸¹ See, *e.g.*, ICC Case No. 6363, 1991 (The arbitral tribunal was silent as to the question of the law governing *res judicata*. It appears that the tribunal applied general *res judicata* principles, in particular the triple identity test). See also CAS, *Dieter Baumann v International Olympic Committee (IOC), National Olympic Committee of Germany and International amateur Athletic Federation (IAAF)*, pp. 633 *et seq.* The CAS Panel did not specifically determine the law governing *res judicata*. However, the Panel stated that it would determine the dispute, *inter alia*, pursuant to “general principles of law and the rules of law, the application of which it deems appropriate”.

⁶⁸² SHEPPARD, *Res Judicata and Estoppel*, p. 231.

that, in the absence of a choice by the parties regarding procedure, the domestic procedural law of the country of the arbitral seat should apply⁶⁸³.

452. It has also been submitted that there is a tendency on the part of arbitral tribunals to avoid an unduly mechanical application of domestic preclusion rules and to adopt instead pragmatic approaches that further the objectives of the parties' arbitration agreement. It was said that these tribunals are formulating "*sui generis* international preclusion principles"⁶⁸⁴ which respect the presumptive desire of the parties to resolve all of their disputes in a single, centralised proceeding⁶⁸⁵. It is possible to observe a readiness among arbitral tribunals to depart from a mechanical application of domestic preclusion rules in favour of more international rules, in particular in recent years. Such readiness to adopt a more pragmatic and flexible approach has already been observed in public international law⁶⁸⁶. However, the review of arbitral case law has shown a great diversity in the laws and principles applied to *res judicata* with many tribunals relying on domestic *res judicata* rules designed for judgments. It remains to be seen whether the trend towards flexible and pragmatic international arbitration *res judicata* principles will further establish itself in the future.

2.2.2. Which *res judicata* requirements must be met before international arbitral tribunals?

453. While some arbitral tribunals applied the applicable *res judicata* requirements in the same way as state courts⁶⁸⁷, many tribunals interpreted the requirements in a more flexible and pragmatic way, taking into consideration the circumstances of the particular case.

454. Order No. 5 of 2 April 2002 constitutes an example for both a strict application of domestic *res judicata* rules and an attempt to find a pragmatic solution to safeguard

⁶⁸³ See also *infra*, paras 522 *et seq.*

⁶⁸⁴ BORN, p. 2918.

⁶⁸⁵ BORN, p. 2919.

⁶⁸⁶ See *supra*, para. 300.

⁶⁸⁷ See, *e.g.*, CRCICA Case No. 67/1995 (The arbitral tribunal closely followed Egyptian law and determined that the prior judgment could not operate as a *res judicata* in the subsequent arbitration because the court who rendered the judgement did not have jurisdiction to make the ruling pursuant to Article 203/5 of the Egyptian Law of Civil and Commercial Procedures).

the interests at stake. The ICC tribunal with seat in Geneva stated expressly that it would apply the same test with respect to *res judicata* as a Swiss court. It held that

“[...] it is settled law by now that an arbitral tribunal sitting in an international arbitration in Switzerland must apply the same rules as would a Swiss court in matters of *res judicata*”⁶⁸⁸.

455. The tribunal was compelled to follow this approach by the Federal Tribunal’s ruling in the *Fomento* decision, which the tribunal considered to be “in and of itself debatable”⁶⁸⁹. The tribunal held that because the requirements under Swiss law were not met the *res judicata* doctrine did not apply and could not prevent the claimant from requesting the tribunal to grant the same interim relief as the one previously denied by a New York court. Nevertheless, the tribunal denied the claimant’s request based on the principles of judicial efficiency and procedural economy, as well as a lack of sufficient protective interest of the claimant. The tribunal reasoned that

“[i]t is not opportune to allow an applicant to repeat, against the will of the opposing party, costly and time consuming proceedings which the parties already went through before another judicial body. There is no sufficient protective interest [...] on the part of the applicant if the request is the same, the facts and evidence relied upon are essentially the same, the legal tests to be applied in deciding the matter are the same, and the principles of due process were observed in the first proceedings. Under these circumstances, it cannot be reasonably asked either from the arbitrators or from the applicant’s opponent to go through the same matter again. The wish of the applicant to obtain a more favorable ruling, understandable as it is, can by itself not constitute a sufficient protective interest”⁶⁹⁰.

456. It is often considered a requirement for the application of the *res judicata* doctrine that the prior judgment or award will be entitled to recognition in the country of the place of arbitration⁶⁹¹. While arbitral tribunals seem ready to assess the “recognisability” of prior judgments, they appear reluctant to pronounce themselves on the validity of prior awards. In Order No. 5 the tribunal rejected the *res judicata* defense

⁶⁸⁸ Order No. 5, 2 April 2002, p. 815.

⁶⁸⁹ *Ibid.*

⁶⁹⁰ Order No. 5, 2 April 2002, pp. 815 *et seq.*

⁶⁹¹ SHEPPARD, *Res Judicata and Estoppel*, p. 232.

on the grounds that the prior judgment of the New York court could not be recognised in Switzerland⁶⁹². By contrast, in ICC Case No. 3383 of 1979 the tribunal refused to pronounce itself on the validity of a prior award which had not been challenged before the supervisory courts. In the commentary accompanying this award it was contended that the second arbitral tribunal has no power to examine whether the first award would be capable of recognition in the country of the place of arbitration, since this would allow the second tribunal to rule on the first tribunal's jurisdiction and on the regularity of the first arbitration proceedings, which would be outside the second tribunal's jurisdiction⁶⁹³.

457. In most cases, the arbitral tribunals did not examine whether a prior award or judgment would be recognised in the country of the arbitral seat or elsewhere. Most tribunals merely determined whether there was identity of parties, cause and object in both proceedings⁶⁹⁴. In the majority of the examined awards, the tribunals who applied domestic *res judicata* rules did not refer to any legal authorities or case law, in some cases even legislation, defining and specifying the meaning of the triple identity test under the relevant domestic law. Rather, they interpreted the notions of parties, cause and object in a more pragmatic and intuitive way, which they considered to be appropriate in the case at hand⁶⁹⁵. As a result, in some cases the tribunals applied the *res judicata* requirements in a way that did not entirely correspond to the requirements under the relevant domestic law⁶⁹⁶. Accordingly, while there appears to be a general understanding in international arbitration practice as to the applicability of the triple identity test, there is no generally accepted way of applying and interpreting the triple identity test.

⁶⁹² See also ICC Case Nos 2475 & 2767, 1977. The arbitral tribunal decided that a prior judgment of the Brussels Court of Appeal should operate as a *res judicata* in the arbitration because it was covered by the 1968 Brussels Convention which required all its Contracting States to recognise judgments rendered in any of the other Contracting States. The tribunal held that since the courts of the parties' countries of origin would be bound by the judgement, the parties should not be allowed to avoid the judgment in the arbitration.

⁶⁹³ ICC Case No. 3383, 1979, p. 398.

⁶⁹⁴ See, e.g., CRCICA Case No. 67/1995; ICC Case No. 6363, 1991 ("Where there is, cumulatively, identity as regards parties, subject matter of the dispute *petitum*, and *causa petendi*, between a prior judgment and a new claim, the new claim is barred by the principle of *res judicata*. [...] A discrepancy between any one of the elements of a current claim and a past judgment comprising a *res judicata* is enough to defeat a defense based on *res judicata*"); ICC Case No. 4126, 1984; ICC Case No. 7438, 1994; ICC Case No. 6293, 1990.

⁶⁹⁵ HASCHER, p. 24.

⁶⁹⁶ See HASCHER, pp. 21 and 24.

458. ICC Case No. 6293 of 1990 illustrates this flexible approach. The tribunal applied New York law to *res judicata*. However, the tribunal specified that whatever the requirements under New York law, the doctrine of *res judicata* seeks to prevent the reconsideration between the same parties of a controversy that has already been decided in a final and binding judgment or award. According to the tribunal, the doctrine of *res judicata* applies if a claim is essentially identical to a claim previously decided, whatever the requirements under the applicable law. The tribunal thereby appeared to apply the triple identity test as a generally accepted principle which applies independently of the applicable law⁶⁹⁷.

459. Concerning in particular the requirement of party identity, the more flexible approach is illustrated by ICC Case No. 8023 of 1995 where the arbitral tribunal held that the parties were bound by a prior award, even though they were not strictly identical to the parties in the first arbitration. The arbitral tribunal had determined French law to govern *res judicata* pursuant to which the doctrine generally applies only where the parties in both proceedings are identical and act in the same legal capacity⁶⁹⁸.

460. Arbitral tribunals have not given much consideration to the identity of cause and object requirements⁶⁹⁹.

⁶⁹⁷ See also CAS, *Dieter Baumann v International Olympic Committee (IOC) et al*, where the arbitral tribunal applied the doctrine of *res judicata*, including the triple identity test, as a general principle of law.

⁶⁹⁸ See also ICC Case No. 4126, 1984 (The arbitral tribunal considered a party to be “bound” by a prior award to which it was not a party on the ground that the new request was “essentially identical” to that decided in the prior procedure); ICC Case No. 6363, 1991 (The tribunal examined the party identity requirement under both a strict and a flexible standard. The respondent argued that a prior decision was binding on both of its opponents in the arbitration, *i.e.* claimant and ME company on whose behalf claimant acted. The claimant argued that it was not bound by the prior decision because it was not a party to the prior proceedings. The tribunal rejected the respondent’s argument based on *res judicata* on the ground that there was no party identity. Applying first a strict test, it held that claimant, who was not a party to the prior proceedings, was “in law and fact” a separate person from ME company, who was a named party to the prior proceedings. The tribunal, applying a more flexible standard, then held that claimant’s involvement alongside ME company in the prior proceedings was not sufficient to make claimant a party to the prior decision).

⁶⁹⁹ See, *e.g.*, ICC Case No. 9800, 2000; ICC Case No. 7438, 1994 (reported by HASCHER, pp. 19 *et seq.*). According to Hascher (p. 22), rather than a question of *res judicata*, the problem in ICC Case No. 7438 concerned the question of the rational link between the successive claims, one of which being accessory to the other. On the subject matter identity requirement, see also CAS, *Dieter Baumann v International Olympic Committee (IOC) et al*. The CAS held that the primary issue before it was whether the removal of Baumann’s accreditation to compete in the Olympic Games in Sydney by the IOC was well-founded or not. It decided that the subject matter was not the same as in the prior proceedings before the IAAF Arbitration Panel, in which the IAAF placed a two-year ban from competition on Baumann. See also

461. Concerning the doctrine of issue preclusion, the AAA tribunal in the arbitration between Smithkline Beecham Biologicals SA (Smithkline) and Biogen Inc (Biogen) applied a test based on international arbitration law to determine that the issues before it were not identical to the issues determined in a prior UNCITRAL arbitration. The disputes before the AAA and UNCITRAL tribunals arose out of two license agreements. The first license agreement granted Smithkline a license for the United States (the “US License”). The second agreement granted a license for the rest of the world, apart from Japan (the “International License”). The International License provided for UNCITRAL Arbitration in London. The US License provided for AAA arbitration in New York.

462. Smithkline commenced arbitration proceedings against Biogen in London for the International License. The London tribunal rendered an award in favour of Smithkline in 1992. In 1993 Smithkline submitted the same claim in AAA arbitration proceedings in New York with respect to the US License. After the London award was affirmed on appeal, Smithkline invoked the doctrine of collateral estoppel in the AAA arbitration.

463. The AAA tribunal rejected Smithkline’s collateral estoppel plea holding that the issues in question were not identical to the issues determined in the prior UNCITRAL award because

“[t]he Parties have entered into two different agreements [...] containing two different arbitration clauses, providing for arbitration in two different forums relating to two different sets of rights”⁷⁰⁰.

464. The tribunal added that the UNCITRAL tribunal could not have rendered a decision on the US License since it did not have jurisdiction over the US license agreement. After a full hearing on the merits, the AAA tribunal ruled in Biogen’s favour.

465. A similar approach was followed in ICC Case No. 7061 of 1997. The case

Case No. A33 before the Iran-United States Claims Tribunal.

⁷⁰⁰ See *Smithkline Beecham Biologicals, S.A. v Biogen, Inc.*, 1996 WL 209897 (S.D.N.Y. 1996)*7.

involved four separate arbitration proceedings arising from a same project. One central issue in each arbitration was the existence of deceit at the time the agreements were concluded. The claimant raised a plea of issue estoppel, relying on a prior award rendered in one of the other arbitrations, in which the tribunal had recognised the existence of deceit, had declared the contract at issue void and ordered respondent to pay damages to claimant. The arbitral tribunal clearly adapted the “issue estoppel” test to the international arbitration context. As reported by Hanotiau, it rejected the plea of issue estoppel on the grounds that

“[...] the parties were not the same in the two cases; that the arbitration in question took place on the basis of a different supply contract and arbitration agreement, albeit with the seat of arbitration in the same city; that the applicable law was also different, and that it could not be assumed that the same evidence was equally available to both arbitral tribunals”⁷⁰¹.

466. Finally, some arbitral tribunals considered the type of decision that may become *res judicata*. While it appears to be well-established that prior judgments and awards (including partial awards) on the merits may operate as *res judicata* in subsequent arbitration proceedings, the situation is not clear with respect to prior decisions on jurisdiction and decisions granting or refusing interim relief in aid of arbitration proceedings.

467. Arbitral tribunals are divided on the question whether prior decisions on jurisdiction are binding on the tribunal. In ICC Case No. 3383 of 1979 the tribunal afforded absolute *res judicata* effects to a prior award on jurisdiction⁷⁰².

468. By contrast, in several cases where arbitral tribunals were confronted with anti-arbitration injunctions issued by a state court, the tribunals refused to consider themselves bound by the prior jurisdictional determinations of the courts, situated both in and outside the country of the place of arbitration. The arbitral tribunals generally held that prior determinations by a court relating to the jurisdiction of the arbitral

⁷⁰¹ See HANOTIAU, *Complex Arbitration*, para. 551.

⁷⁰² See *supra*, paras 445 *et seq.* See also ICC Case 6535, 1992, pp. 495-500.

tribunal could not have any effect on the arbitration proceedings⁷⁰³.

469. Concerning provisional measures, it is not clear whether arbitral tribunals will always afford *res judicata* effects to a prior court decision granting or denying interim relief. Only few published awards deal with this question. In ICC Case No. 4126 of 1984 the arbitral tribunal seemed to be of the opinion that prior interim measures may generally have *res judicata* effects in subsequent arbitration proceedings. The tribunal decided that the party whose request for interim relief was previously denied by a state court could not bring an essentially identical request again before the arbitral tribunal, because it was “bound” by the prior court decision⁷⁰⁴.

470. In Order No. 5 of 2 April 2002 the tribunal was more cautious. It held that the principles of judicial efficiency and procedural economy prevented a party from requesting the arbitral tribunal to grant the same interim relief as the one previously denied by a state court. However, it expressed doubts as to whether the doctrine of *res judicata* applies to provisional measures as a matter of principle⁷⁰⁵. Since the requirements for *res judicata* were not met, the question was left open.

471. For the sake of completeness it may be mentioned that it has been held that only final decisions may operate as *res judicata*, to the exclusion of preliminary decisions. This was held in ICC Case No. 3267 of 1984 in the context of a prior partial award rendered in the same arbitral proceedings. The arbitrator refused to extend the *res*

⁷⁰³ See, BORN, p. 2926 with reference to unidentified ICC Case, reported in DERAINS/SCHWARTZ, para. 155, p. 106; ICC Case No. 10623, 2001; ICC Case No. 5294, 1988; ICC Case No. 4862, 1986, pp. 508-09. Outside the context of anti-arbitration injunctions, see also *The Republic of Kazakhstan v Istil Group Inc (No. 3)* [2007] EWHC 2729 (Comm). A LCIA tribunal sitting in London accepted jurisdiction over a dispute despite a prior judgment of the Paris Commercial Court in which the court established that there was no applicable arbitration agreement. Given the sovereign immunity of the Republic of Kazakhstan before the French courts, the Paris court directed the parties to litigate in Kazakhstan. Disregarding this ruling, Istil commenced LCIA proceedings in London and the tribunal accepted jurisdiction. The tribunal proceeded to make an award on liability and ordered Kazakhstan to pay a certain amount of money to Istil. This award on liability was set aside by the English Commercial Court, *inter alia*, on the ground that it violated the doctrine of issue estoppel. The LCIA tribunal was bound by the final decision of the Paris court in which it had finally established that there was no valid arbitration agreement ([2006] EWHC 448 (Comm)). Istil sought to pursue the LCIA arbitration on the ground that the first partial award on jurisdiction was still effective and not affected by the annulment of the award on liability. The High Court disagreed and granted an anti-arbitration injunction restraining Istil from pursuing the LCIA arbitration.

⁷⁰⁴ See *supra*, paras 448 *et seq.*

⁷⁰⁵ Order No. 5, 2 April 2002, p. 815 (“Whatever the correct legal position on the question of *res judicata* [...] of provisional remedies in international matters [...]”).

judicata effects of the prior partial award to preliminary issues holding in relevant part:

“[...] the arbitral tribunal made clear in other parts of its first award that the views expressed therein on certain other aspects of the case were of a preliminary nature only and without prejudice to its final decision. On such aspects, the arbitral tribunal holds itself entirely free to adopt other views with the benefit of further evidence and investigations”⁷⁰⁶.

2.2.3. To what extent have international arbitral tribunals afforded *res judicata* effects to prior decisions?

472. With respect to the scope of *res judicata*, arbitral tribunals generally appear to apply the relevant law in the same way as courts. Arbitral tribunals who applied domestic laws generally applied the law strictly, usually without reference to any domestic legal authorities, case law or legislation. Accordingly, the scope of the *res judicata* effects afforded to prior judgments and awards varies depending on the domestic law applied by the arbitral tribunals. While some tribunals granted broad *res judicata* effects, including to reasons, others strictly limited the *res judicata* effects to the prior decision’s *dispositif*.

473. No particular international arbitration practice with respect to the scope of *res judicata* emerges from arbitration case law. There does not appear to be a tendency to adopt a more flexible and pragmatic approach, as was observed with respect to the requirements for *res judicata*.

474. The issue of the scope of the *res judicata* effects of a prior award was addressed in ICC Case Nos 2745 & 2762 of 1977. A first arbitral tribunal with seat in France had ordered a German company to pay damages to a Belgian company on the grounds that there was no case of *force majeure*. The second arbitral tribunal, who also had its seat in France, applied the French and Belgian notion of *res judicata* to determine the *res judicata* effects of the prior award. It held that those reasons which constitute the necessary foundation of the *dispositif* are covered by the *res judicata* effect of the decision. Since the finding of the first tribunal that there was no *force majeure* was essential for its decision on damages, it was *res judicata* and the existence of *force majeure* could therefore not be

⁷⁰⁶ See *supra*, para. 322.

argued again before the second tribunal.

475. The tribunal in ICC Case No. 8023 of 1995 also applied French law and held that *res judicata* covers not only the *dispositif* of the first award, but also those reasons that form the *dispositif's* necessary foundation. The tribunal held further that the *res judicata* effects of the first award attached not only to necessary reasons expressly pronounced in clear and unambiguous terms, but also to findings necessarily implied in the first award. By contrast, the tribunal ruled that it was not precluded by the doctrine of *res judicata* from deciding issues that were not determined, expressly or impliedly, in the first award⁷⁰⁷.

476. In ICC Case No. 7438 of 1994 the arbitral tribunal applied the procedural law of the canton of Zurich. The arbitrator strictly adhered to the rule that the *res judicata* effect of a decision attaches only to its *dispositif*, to the exclusion of reasons. In conformity with Swiss law, the arbitrator referred to the reasoning only to determine the meaning and scope of the *dispositif* of the first award⁷⁰⁸.

477. There are few awards in which arbitral tribunals applied the extended doctrine of *res judicata* and have afforded *res judicata* effects to issues that were not, but could and should have been decided in the first proceedings. One example is the second SIAC award between Dexia Bank and Persero. As was seen earlier, in the second SIAC arbitration Persero raised an issue which had not been covered in the first arbitration. The second SIAC tribunal denied jurisdiction over the merits of the dispute. Relying on the rule in *Henderson v Henderson*, the tribunal held that the second SIAC arbitration constituted a misuse of process since Persero could and should have raised the issue in the first SIAC arbitration⁷⁰⁹.

⁷⁰⁷ See HASCHER, pp. 23-24.

⁷⁰⁸ See HASCHER, p. 23.

⁷⁰⁹ See *supra*, para. 316. See also unidentified ICC case reported in ILA, *Interim Report*, p. 25. At issue was the *res judicata* effect of a prior ICC award before another ICC tribunal. According to ILA, “[...] a tribunal sitting in France but applying New York law found that the claimant should have asserted its present claim by way of counterclaim or defence in earlier ICC proceedings and that having had a full and fair opportunity to do so and, not having done so, was now barred from bringing a second action seeking relief inconsistent with the earlier award”. The tribunal applied the US doctrine of claim preclusion which prevents the re-litigation in subsequent proceedings of matters which were not but could and should have been brought in the earlier proceedings. See however the second award underlying

478. It is useful to draw the attention to one example where a flexible and pragmatic approach was adopted with respect to the scope of *res judicata*. In ICC Case No. 3267 the sole arbitrator had to determine the *res judicata* effects of his prior partial award. The arbitrator granted *res judicata* effects to the reasons constituting the necessary foundation of the *dispositif* on the grounds that it would be unfair to the parties to depart in a final award from such determinations made in the prior partial award. The arbitrator, who was authorised by the parties to decide as *amiable compositeur*, departed from Swiss law, which was the law of the place of arbitration and according to which the *res judicata* effect of a decision is strictly limited to the *dispositif*. The tribunal did so “irrespective from the academic views” held on this issue⁷¹⁰.

2.2.4. In what circumstances have international arbitral tribunals denied *res judicata* effects to prior decisions that were *res judicata*?

479. The question arises whether there are any circumstances under which arbitral tribunals have denied *res judicata* effects to a prior award or judgment, even though all requirements for the application of the *res judicata* doctrine were met.

480. While there are only few published awards addressing this issue, it appears that arbitral tribunals acknowledge that fraud may constitute an exception to *res judicata*. In *Antoine Biloune and Marine Drive Complex Ltd (MDCL) v Ghana Investments Centre (GIC) and the Government of Ghana*, the UNCITRAL tribunal first rendered a partial award holding that it had jurisdiction over the dispute and declaring that the Government of Ghana had expropriated MDCL’s assets and Mr. Biloune’s interest in MDCL. The tribunal then rendered a final award on damages and costs. The respondents requested the tribunal to reconsider its prior partial award.

481. The tribunal declared that the partial award was final and binding on the parties. However, applying customary principles of international law, the tribunal held that it

the decision of the Cour d’appel de Paris in *Marriott v Jnah* (reported in *Cahiers de l’arbitrage*, Vol. 4 (2010), p. 1172), where the arbitral tribunal stated that there is no legal principle similar to the English rule in *Henderson v Henderson* in international arbitration (“[il n’y a pas] de théorie juridique applicable en matière d’arbitrage international qui soit similaire à la théorie anglaise *Henderson c/Henderson*, laquelle imposerait à JNAH de brûler toutes ses munitions dans une même procédure d’arbitrage”).

⁷¹⁰ Relevant passages of the award are cited *supra*, fn 680.

would exceptionally reconsider its prior partial award if it was shown by credible evidence that the tribunal had been the victim of fraud and that its determinations in the previous award were based on false testimony. The tribunal held in relevant part:

“Nevertheless, a court or Tribunal, including this international arbitral Tribunal, has an inherent power to take cognisance of credible evidence, timely placed before it, that its previous determinations were the product of false testimony, forged documents or other egregious ‘fraud on the tribunal’ [...]. Certainly if such corruption or fraud in the evidence would justify an international or a national court in voiding or refusing to enforce the award, the Tribunal also, so long as it still has jurisdiction over the dispute, can take necessary corrective action [...]. The present Tribunal would not hesitate to reconsider and modify its earlier award were it shown by credible evidence that it had been the victim of fraud and that its determinations in the previous award were the product of false testimony”⁷¹¹.

2.2.5. What effects have international arbitral tribunals afforded to prior decisions that were not *res judicata*?

482. There are several published awards in which arbitral tribunals have given some effects to a prior decision, even though it did not qualify as *res judicata*. This was done typically in situations where the prior decision involved a case that was not identical, but closely connected to the case before the arbitral tribunal. The effects given to such prior decisions varied among arbitral tribunals. While some tribunals considered themselves bound by a prior decision that was not *res judicata*, others were more cautious holding that they would take the prior decision into consideration.

483. As was seen above, in ICC Case No. 4126 of 1984 the tribunal refused to grant a request for interim relief that had previously been denied by a state court. Because the object of both proceedings was “essentially identical” and because there was no change in circumstances, the tribunal concluded that the party to both procedures was bound by the prior court decision. The tribunal based its decision on the principle of good

⁷¹¹ Award cited *supra*, fn 487, paras 33-34. See also Cour d’appel de Paris, 17 June 2010, *SARL African Petroleum Consultants (APC) v Société Nationale de Raffinage (SONARA)*, Rev. Arb., No. 3 (2010), pp. 671 *et seq.*; Cour de Cassation, *Fougerolle v Procofrance*, 25 May 1992, Rev. Arb. (1993), p. 91.

procedural order instead of the doctrine of *res judicata*⁷¹². This decision was endorsed by the ICC tribunal in Order No. 5 of 2 April 2002. Because the judgment on interim relief could not be recognised in Switzerland it could not operate as a *res judicata* in the ICC arbitration. Nevertheless, the ICC Tribunal refused to reconsider the claimant's request for interim relief for reasons of judicial efficiency and procedural economy⁷¹³.

484. In ICC Case No. 6363 of 1991 the arbitral tribunal was slightly more cautious. It concluded that a prior court judgment could not operate as a *res judicata* in the ICC arbitration, because there was no identity of parties. Nevertheless, the arbitral tribunal held that it could not ignore the prior judgment holding in relevant part:

“A discrepancy between any one of the elements of a current claim and a past judgment comprising a *res judicata* [*i.e.* identity of parties, cause and subject matter] is enough to defeat a defense based on *res judicata*. Enough has been said to show that the [court] decision is *res judicata* between [C] and [B], but not as between [A] and [B]. This does not mean that the Decision can be ignored. Parts of it represent an authoritative ruling on the position of [C] country law on certain matters that may be relevant in this case”⁷¹⁴.

485. In ICC Case No. 7061 the tribunal reached a similar result. The tribunal held that it was not bound by the prior award because the parties were not identical in the two proceedings. In addition, the prior arbitration had taken place on the basis of a different contract and arbitration agreement, the applicable law was different and the evidence available to both tribunals was also different. The tribunal concluded:

“This arbitration tribunal is not bound by the X award; nor are the parties to these arbitration proceedings. There can be no issue estoppel. Nonetheless, it provides a helpful analysis of the common factual background to this dispute. Accordingly, we have borne its findings and conclusions in mind, whilst taking care to reach our own conclusions on the materials submitted by these parties in these proceedings”⁷¹⁵.

486. Likewise, the AAA tribunal in the arbitration between Smithkline and Biogen

⁷¹² See *supra*, paras 448 *et seq.*

⁷¹³ See *supra*, paras 454 *et seq.*

⁷¹⁴ ICC Case No. 6363, 1991, para. 43.

⁷¹⁵ Case reported by HANOTIAU, *Complex Arbitration*, para. 551.

rejected Smithkline's collateral estoppel plea. However, the AAA tribunal decided to admit the prior UNCITRAL award as evidence:

“The issues submitted in the present arbitration are not precluded by the prior arbitral decision and judgment referred to above. [...] Nevertheless, we will allow into evidence in the instant matter the UK arbitral decision, the ensuing judgment(s) and the evidentiary submissions made in those proceedings, for such persuasive value as they may have”⁷¹⁶.

487. The awards examined above show that arbitral tribunals have afforded some effects to prior decisions that were not *res judicata*, if the case in which the prior decision was rendered was closely connected to the case before the arbitral tribunal. The above survey has also shown that the effects afforded to the prior decisions varied in their intensity. While some arbitral tribunals considered themselves bound by a prior decision, others would only take the prior decision into consideration. The survey could not establish that the intensity of the effects attached to the prior decision was proportional to the closeness of the link between the prior and subsequent proceedings. The arbitrators appeared to grant the effects they considered appropriate in the circumstances of the case.

2.2.6. Conclusion

488. In light of the above findings it may be concluded that only a few established principles emerge from international commercial arbitration practice with respect to *res judicata*. These principles may be summarised as follows:

- Prior final judgments and awards (including partial awards) rendered on the merits may operate as *res judicata* in subsequent arbitral proceedings;
- The doctrine of *res judicata* generally applies only if there is identity of parties, cause and object in both proceedings;
- An arbitral tribunal may reconsider a prior decision, even though it qualifies as *res judicata*, if the prior decision was obtained by fraud;

⁷¹⁶ See *Smithkline Beecham Biologicals, S.A. v Biogen, Inc.*, 1996 WL 209897 (S.D.N.Y. 1996)*7 *et seq.*

- Where a prior decision does not qualify as *res judicata*, an arbitral tribunal seised subsequently of a closely related case may grant such effects to the prior decision as it deems appropriate in the circumstances of the case.

489. In addition, the review of arbitration case law has shown that there appears to be a tendency among arbitral tribunals to apply and interpret the triple identity test in an intuitive, pragmatic and flexible way.

490. Apart from the above, there appears to be no established practice with respect to *res judicata* in international commercial arbitration practice. In particular:

491. No clear choice-of-law rule concerning the law governing *res judicata* before international arbitral tribunals emerges from case law. Arbitral tribunals apply a variety of different laws or rules of law to *res judicata*, ranging from different domestic laws to general principles of law, oftentimes without substantiating the choice-of-law;

492. There are no established rules among arbitral tribunals with respect to *res judicata* requirements. There appears to be no generally accepted standard for the application or interpretation of the triple identity test;

493. There is no established practice among arbitral tribunals on the question of the binding effect of prior awards or judgments on jurisdiction;

494. There appears to be no established rule on the question whether prior decisions on interim relief may operate as *res judicata*;

495. There is no particular rule with regard to the scope of the *res judicata* effects to be afforded to prior decisions, with arbitral tribunals typically following the provisions of the law or rules of law determined to govern *res judicata*.

496. Accordingly, save for the few exceptions listed above, no clear *res judicata* rules emerge from international commercial arbitration practice to fill the multiple gaps left open by international commercial arbitration law.

3. CONCLUSION

497. The first part of this chapter has shown that the occurrence of *res judicata* issues puts several important interests in question and may potentially harm the very existence of the arbitral process. As was shown in a study into corporate attitudes and practices towards international arbitration, conducted in 2006 by PriceWaterhouseCoopers and the School of International Arbitration at Queen Mary and Westfield College, the enforceability of awards is ranked as the top reason by major international corporations for choosing international arbitration. The expense and length of time to resolve disputes were determined to be the most commonly cited disadvantages of international arbitration⁷¹⁷. The rendering by arbitral tribunals of awards inconsistent with prior decisions may frustrate the enforceability of the awards. Furthermore, the unnecessary duplication of proceedings may make the dispute resolution process longer and more costly for the parties. This could dissuade parties from submitting their disputes to international arbitration.

498. International commercial arbitration law and practice, in their current state, do not deal with the problem of *res judicata* satisfactorily. According to Sheppard “*res judicata* in the context of international arbitration is presently in a no man’s land, with considerable uncertainty as to its appropriate application”⁷¹⁸. The findings made in this chapter confirm this observation.

499. International commercial arbitration “hard law” does not give any guidance to international arbitral tribunals on how to deal with *res judicata* issues. National courts generally extend traditional litigation rules of *res judicata* to international arbitration without examining whether this is desirable.

500. Likewise, international arbitral tribunals typically look at domestic litigation rules to govern *res judicata* issues. Hence, the effects of national court judgments in subsequent arbitral proceedings depend on different and sometimes conflicting

⁷¹⁷ PWC/SIA, pp. 6 *et seq.* Other top reasons for choosing international arbitration to resolve disputes were the flexibility of procedure, the privacy the process provides and the parties’ ability to select the arbitrators.

⁷¹⁸ SHEPPARD, *The Scope and Res Judicata Effect of Arbitral Awards*, p. 265.

regulations of different national jurisdictions. The same holds true for arbitral awards because awards are commonly treated like judgments with respect to their *res judicata* effects⁷¹⁹. Arbitral tribunals frequently apply the domestic law of the arbitral seat to determine the effects of an award. While this approach is consistent with the traditional rationale followed by some state courts that *res judicata* issues are matters of procedure and should therefore be governed by the *lex fori*, it is not the appropriate approach for arbitral tribunals. Whatever the domestic law applied, as will be discussed in Chapter Five below, it is doubtful whether a wholesale transposition of domestic preclusion rules to international arbitration is desirable.

501. The review of arbitration case law has shown that, absent a clear and well-established choice-of-law rule, arbitral tribunals apply a variety of different laws or rules of law to *res judicata* issues. There are also no clear and generally-accepted rules with respect to many issues, such as the requirements for and the scope of *res judicata*.

502. In summary, the way in which *res judicata* issues are currently dealt with in international commercial arbitration varies not only among legal systems, but also among arbitral tribunals. This lack of uniformity contradicts the parties' intention when choosing international arbitration to establish a single and uniform international dispute resolution mechanism that will lead to a final and binding award, which will be enforceable in most countries. The lack of uniformity leads to uncertainty, as well as unfair and unpredictable results, depending on where the losing party seeks to re-litigate the dispute. The disappointed party could attempt to re-litigate the dispute in whatever forum it can find that has the least effective preclusion rules and the widest jurisdiction rules⁷²⁰. This result would be unsatisfactory, not only for the parties, but for the international arbitration process as a whole.

503. Based on the above, it can be concluded that the occurrence of *res judicata* issues before international arbitral tribunals constitutes a serious problem that is currently not dealt with satisfactorily. There is thus a need to find appropriate solutions for this problem.

⁷¹⁹ BREKOULAKIS, p. 205.

⁷²⁰ BORN, pp. 2912 *et seq.*

504. It has been said that the most challenging issue is not to recognise that there is a problem, but rather to find ways (if any) open to international arbitral tribunals for dealing with the problem and which do not at the same time conflict with other fundamental principles of international commercial arbitration⁷²¹. The challenge of the remaining chapters will be to find and formulate such ways.

⁷²¹ HOBÉR, p. 244.

CHAPTER 5

Search for an Appropriate Approach

505. The search for a solution to the problem of *res judicata* in international arbitration must begin with the determination of an appropriate approach. This chapter will begin by discussing different possible approaches to *res judicata* before international arbitral tribunals (1.). The second part of the chapter will then explain why the problem of *res judicata* should be dealt with by transnational *res judicata* principles (2.).

1. POSSIBLE APPROACHES TO *RES JUDICATA* BEFORE INTERNATIONAL ARBITRAL TRIBUNALS

506. An introductory remark should be made as to why the *res judicata* doctrine should apply at all in international arbitration. It has been said that the doctrine of *res judicata* is “one of the most sophisticated, technical and overregulated doctrines in national civil procedure”⁷²². However, an important feature of international arbitration is the large autonomy granted to parties and arbitrators. The adoption of *res judicata* principles could put this flexibility at risk and make the arbitral process more similar to litigation, which is precisely what the parties seek to avoid by concluding an arbitration agreement. This could hold true not only for binding rules, but also for non-binding guidelines which are sometimes so widely and rigorously applied by arbitrators as if they were binding⁷²³. For years, several prominent international arbitration authorities have warned against a worrying trend to imitate the technicality and formality of domestic court proceedings⁷²⁴.

⁷²² BREKOULAKIS, p. 182.

⁷²³ See PARK, paras 7-4 *et seq.*

⁷²⁴ See, *e.g.*, LALIVE (*Nouveaux regards*, p. 13) according to whom international arbitration suffers from

507. It has been said that adopting detailed *res judicata* rules in international arbitration would go against the modern trend of not imposing any procedural constraints on international arbitrators, but to let them conduct the arbitration in a way they deem appropriate in the circumstances of the particular case⁷²⁵. Based on considerations of mutual respect and comity, arbitral tribunals could be allowed to decide whether and to what extent they are bound by prior judgments or awards in the circumstances of each case. Any inconsistent decisions rendered in this process could be dealt with in annulment or recognition and enforcement proceedings, thereby avoiding that two contradictory decisions are recognised or enforced within a same country.

508. Such “*ad hoc* solutions”, however, do not appear appropriate⁷²⁶. In the absence of pre-established rules or practices with respect to *res judicata* there is great uncertainty and unpredictability for arbitration users. Because the parties’ rights and obligations will be determined by a final and binding award, they will expect to be treated fairly and equally. They will also expect that the arbitration is conducted according to the “regular way to do things”⁷²⁷. Because the concept of *res judicata*, albeit differing in important aspects from one country to another, exists today in all jurisdictions and is even recognised as either a rule of customary international law or a general principle of law⁷²⁸, parties will likely expect arbitrators to apply this doctrine where certain requirements are met. This is also in line with international arbitration law and practice. It is generally considered that *res judicata* rules apply in arbitration proceedings, even though there is great disagreement as to how they should be applied.

509. Dealing with the problem of contradictory decisions only at the annulment or recognition and enforcement level is problematic. This would lead to wasteful

excessif “*juridicisation*” or “*processualisation*”; OPPETIT (*Philosophie de l'arbitrage commercial international*, p. 818) uses the term “*juridictionnalisation*” to describe the phenomenon of arbitration proceedings becoming more cumbersome and formalistic; FOUCHARD, *L'arbitrage commercial international*, para. 258 (“*N'est-il pas cependant paradoxal que l'arbitrage, qui se veut un mode souple, non formaliste, de règlement des litiges en vienne à s'aligner sur la procédure judiciaire au point d'adopter ses dispositions les plus draconiennes ? La crainte de procédés dilatoires ne devrait pas pousser trop loin la réglementation arbitrale, au point de la rendre aussi difficile à supporter que les procédures juridictionnelles?*”). See also PARK, para. 7-18.

⁷²⁵ MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage international*, p. 190.

⁷²⁶ PARK, para. 7-46.

⁷²⁷ PARK, *e.g.*, para. 7-23 and para. 7-33.

⁷²⁸ See *supra*, paras 236 *et seq.*

arbitration proceedings. It would only be feasible if there were efficient mechanisms to avoid parallel proceedings between arbitral tribunals and state courts, as well as between different arbitral tribunals. However, practice shows with enough frequency that duplicate proceedings for the same or similar matters can be brought before different arbitral tribunals or before an arbitral tribunal and a state court. Unlike under the system of the EC Regulation No. 44/2001, rules on *lis pendens* and related actions cannot resolve the problem of parallel proceedings in the “decentralised and non-hierarchical field”⁷²⁹ of international arbitration⁷³⁰. The consolidation and joinder of related arbitration and court proceedings, as well as related arbitration proceedings, can usually only be achieved with the consent of all parties involved, even though the current trend is that consent may be either expressed or implied⁷³¹.

510. *Res judicata* guidelines should be elaborated for international arbitral tribunals. Such guidelines would have the benefit of pre-establishing a protocol before the

⁷²⁹ HOBÉR, p. 243.

⁷³⁰ LEW, *Parallel proceedings in international arbitration*, p. 311; MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage international*, pp. 191 *et seq.*; HOBÉR, p. 253; RIVKIN, p. 295. See also the ILA Reports and Recommendations on *lis pendens* and arbitration which strongly endorse the principle of compétence-compétence and generally recommend arbitral tribunals seised of a dispute to proceed with the arbitration if they consider themselves to be *prima facie* competent, regardless of any other pending court or arbitration proceedings involving the same (or substantially the same) parties and questions at issue. As noted by ILA, however, in some circumstances, such as related proceedings where there is a common issue but not identical parties, it might be right as a matter of justice and case management for arbitral tribunals to suspend their proceedings pending the outcome of the other proceedings (DE LY/SHEPPARD, p. 2).

⁷³¹ KAUFMANN-KÖHLER/BOISSON DE CHAZOURNES/BONNIN/MBENGUE, p. 59; CREMADES/MADALENA, p. 532. See also CRIVELLARO, p. 82; HOBÉR, pp. 254 *et seq.*; RIVKIN, p. 290; LEW, *Parallel proceedings in international arbitration*, p. 310; ROUGHTON, p. 2. See also Cour d'appel of Paris, 16 November 2006, *Société Empresa de Telecomunicaciones de Cuba SA v SA Telefonica Antillana et SNC Banco Nacional de Comercio Exterior*, Rev. arb., No. 1 (2008), pp. 109 *et seq.* (An award rendered in Paris was annulled because the arbitral tribunal consolidated two related arbitration proceedings between the same parties, but based on different contracts containing different arbitration clauses, without the consent of the parties). Consolidation provisions in international arbitration instruments are rare. Under Article 41 NAI Arbitration Rules and Article 22.1 (h) LCIA Arbitration Rules a third party may be joined in the arbitration as a party only if it agrees to be joined. Pursuant to Article 1126 (2) NAFTA – Chapter 11, where a tribunal is satisfied that different claims have a question of law or fact in common, the tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, order consolidation and assume jurisdiction over all or some of the claims, hearing all of them together. This provision allows for consolidation upon request by a disputing party and not *ex officio*. See also Article 11 of the new Swiss Rules of International Arbitration of June 2012. The Court, respectively the arbitral tribunal, has authority to decide the question of consolidation and joinder, after consulting the parties and taking into consideration the circumstances of the case; See also Articles 7 to 10 of the new ICC Rules.

proceedings begin⁷³², thereby providing the certainty and predictability that arbitration users expect. They can provide guidance on “repeat-offender trouble spots”⁷³³, such as *res judicata*, without imposing unduly rigid rules on all aspects of the arbitral process. Adopting guidelines, instead of binding rules, would have the additional benefit of not disturbing the endorsement by arbitration institutions and national arbitration laws of procedural flexibility and party autonomy⁷³⁴. In addition, the adoption of binding *res judicata* rules for international arbitration appears premature. Guidelines may help incite the creation of a coherent international arbitration practice.

511. As was seen in Chapters Three and Four, the *res judicata* issues arising before international arbitral tribunals are generally similar to the issues arising in litigation. The occurrence of *res judicata* issues in international arbitration raises similar policy considerations as in litigation. Furthermore, awards are generally considered to be functionally equivalent to judgments and are afforded essentially the same *res judicata* effects as judgments under different domestic laws⁷³⁵. Thus, it appears appropriate to look at domestic litigation rules of *res judicata* as a source of inspiration. The degree to which it will be adequate to build on domestic *res judicata* rules will be discussed below.

512. The following analysis will discuss three possible approaches to *res judicata* before international arbitral tribunals, namely the conflict-of-laws approach (**1.1.**), the comparative law approach (**1.2.**) and the transnational approach (**1.3.**).

1.1. Conflict-of-laws Approach

513. Because the doctrine of *res judicata* varies considerably among jurisdictions the question of the proper law governing *res judicata* in arbitration is clearly posed: which law will provide the criteria to verify that a prior award or judgment qualifies as a *res judicata*? Which law will determine the *res judicata* effects of the prior award or judgment in the arbitration proceedings? According to which law will the arbitrators assess

⁷³² PARK, para. 7-38.

⁷³³ PARK, para. 7-31.

⁷³⁴ See PARK, paras 7-22 *et seq.* According to Park, this homage to flexibility and party autonomy constitutes a marketing tool for arbitral institutions.

⁷³⁵ See *supra*, paras 342 *et seq.* On the comparison of arbitral awards and judgments, see also CLAY, paras 97 *et seq.*

whether there is identity of parties, cause and object in both proceedings? The conflict-of-laws approach consists in defining clear and generally accepted conflicts-of-law rules allowing arbitrators to determine the law or laws governing *res judicata*. As discussed below, the conflict-of-laws approach is difficult and ultimately inappropriate to address the problem of *res judicata* before international arbitral tribunals.

514. The determination of conflict-of-laws rules will depend on the characterisation of *res judicata* as being of substantive or procedural nature. While there is wide support for the view that the doctrine of *res judicata* belongs to procedural law⁷³⁶, the question remains controversial⁷³⁷. It appears that in England⁷³⁸ and the United States⁷³⁹ the doctrine of *res judicata* is part of substantive law. By contrast, in Switzerland *res judicata* pertains to procedure⁷⁴⁰. In France the question is controversial. It has been suggested that in a purely domestic context the negative *res judicata* effect pertains to procedure. However, the positive *res judicata* effect pertains to the merits⁷⁴¹.

515. The ILA recommendations follow this French approach. According to Recommendation No. 5, the award's conclusive effects pertain more to the merits of the dispute on which a successful claimant may build further arbitration proceedings. By contrast, the award's preclusive effects pertain more to procedure⁷⁴².

⁷³⁶ See HABSCHIED, *L'autorité de la chose jugée en droit comparé*, pp. 180 *et seq.*; ILA, *Interim Report*, p. 26; SHEPPARD, *Res Judicata and Estoppel*, p. 229; SHEPPARD, *The Scope and Res Judicata Effect of Arbitral Awards*, p. 283 ; KREMSLEHNER, p. 134.

⁷³⁷ See MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage international* p. 187; HASCHER, p. 20.

⁷³⁸ See HANDLEY, paras 1.07 *et seq.* See also *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041 PC, 1048 ("The [first] award has conferred upon them a right which is enforceable by later pleading an issue estoppel. It is a species of the enforcement of the rights given by the [first] award just as much as would be a cause of action estoppel. It is true that estoppels can be described as rules of evidence or as rules of public policy [...] but that is to look at how estoppels are given effect to, not at what is the nature of the private law right which the estoppel recognises and protects").

⁷³⁹ See WONG, p. 69 with reference to *National Union Fire Ins. Co. v Belco Petroleum Corp.*, 88 F.3d 129, 135-36 (2d Cir. 1996) ("[A] claim of preclusion is a legal defense to [the substantive claim]. As such, it is itself a component of the dispute on the merits. [...] It is as much related to the merits as such affirmative defenses as a time limit in the arbitration agreement or laches"). See also *Chiron Corp. v Ortho Diagnostic System, Inc.*, 207 F.3d 1126, 1134 (9th Cir. 2000) ("As with other affirmative defenses such as laches and statute of limitations, we agree with the Second Circuit that a *res judicata* defense is a 'component' of the merits of the dispute and is thus an arbitrable issue").

⁷⁴⁰ See *supra*, paras 154 and 403.

⁷⁴¹ See *JurisClasseur Droit international, Fasc. 57-10*, paras 71 *et seq.*; *JurisClasseur Droit international, Fasc. 582-30*, paras 14 *et seq.*

⁷⁴² ILA, *Final Report*, para. 66.

516. The view that a decision’s conclusive effect pertains to the merits is justified by the consideration that a final judicial decision creates a new substantive legal relationship between the parties. The court or tribunal subsequently seised has to apply the earlier decision in the resolution of the dispute before it, akin to applying the law governing the merits. The prior decision is viewed as constituting a presumption of the truth with regard to the merits of the case to be determined in the new proceedings⁷⁴³. By contrast, a decision’s preclusive effect pertains purely to procedure because the objective is to put an end to a dispute and to avoid the unnecessary and wasteful duplication of proceedings⁷⁴⁴. It is the result of the mere existence of the prior decision and the interdiction imposed on the state to re-open the matter⁷⁴⁵.

517. In our opinion, both the positive and negative *res judicata* effects of a decision should pertain to procedure because they are fundamentally identical in nature. Their objective is the same, *i.e.* to prevent the re-opening of a matter already decided in prior proceedings⁷⁴⁶. Both the negative and positive *res judicata* effects of a prior decision bar (at least partially) a subsequent court or tribunal from exercising its jurisdiction over the dispute⁷⁴⁷. What is different is the degree of “identicalness” of the subject matter in dispute in the proceedings. The negative *res judicata* effect prevents the re-opening of an entire claim in subsequent proceedings involving the same claim. By contrast, the positive *res judicata* effect prevents the reconsideration of an issue in subsequent proceedings involving a new claim⁷⁴⁸. The subsequent court or tribunal is bound by a prior decision, not because it creates a new substantive legal relationship between the parties, but because of the procedural obligation imposed by *res judicata*⁷⁴⁹.

518. The question of the proper characterisation of *res judicata* as pertaining to procedure or substance remains controversial. At this point, it may be left open. For the reasons discussed below, the question of *res judicata* in international arbitration should

⁷⁴³ JurisClasseur Droit international, *Fasc. 582-30*, para. 14; HABSCHEID, *L'autorité de la chose jugée en droit comparé*, p. 181.

⁷⁴⁴ JurisClasseur Droit international, *Fasc. 582-30*, para. 30.

⁷⁴⁵ MAYER, *Réflexion sur l'autorité négative de chose jugée*, para. 7 with reference to BINDING, p. 326.

⁷⁴⁶ HÉRON/LE BARS, para. 345. See also CLAY, para. 103; HABSCHEID, *L'autorité de la chose jugée en droit comparé*, p.184. *Contra* : MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage international*, p. 197.

⁷⁴⁷ See HABSCHEID, *L'autorité de la chose jugée en droit comparé*, pp. 184 *et seq.* ; CLAY, para. 104.

⁷⁴⁸ HÉRON/LE BARS, para. 345.

⁷⁴⁹ HABSCHEID, *L'autorité de la chose jugée en droit comparé*, p. 182.

be governed by transnational principles, rather than any particular domestic law⁷⁵⁰. Therefore, like in public international law, the question of classification does not arise. The question will however re-surface in the discussion of the legal basis on which international arbitrators may apply transnational *res judicata* principles⁷⁵¹.

519. Independently of any classification of *res judicata*, the final ILA report determined that the possible laws to govern *res judicata* in arbitration proceedings are the law of the place of arbitration of the tribunal before whom the issue of *res judicata* arises, the law of the place where the first award (or judgment) was rendered and the law governing the contract⁷⁵². There is disagreement as to which one of these laws should govern *res judicata*⁷⁵³. It can also be argued that the law of the arbitral seat and the law of the country where the first decision was rendered should apply cumulatively⁷⁵⁴.

520. Another important question concerns the identity of the law that is designated by the conflict-of-laws rule. Where the first decision was an award, the question arises whether the law of the place of the first arbitration should be understood as the national arbitration law of the first arbitral seat or the law governing the first arbitral procedure if it is different⁷⁵⁵. The law governing the contract will generally designate the law governing the merits. However, it could also designate the law governing the arbitration agreement⁷⁵⁶.

521. None of the laws that could possibly govern *res judicata* issues before international arbitral tribunals has a clear and undisputable interest in being applied⁷⁵⁷. Even the clear designation of a particular national arbitration law would be of little help

⁷⁵⁰ See HASCHER, pp. 25 *et seq.* See also ICC 9800, 2000, p. 667. The commentary to ICC 98000 refers to ICC 12226, 2004 (“le principe [de l'autorité de la chose jugée] appartient à l'ordre juridique international. Il s'impose d'abord pour des motifs évidents de sécurité et d'économie. Lorsqu'une autorité compétente, qu'il s'agisse d'un juge ou d'un arbitre, a tranché définitivement une difficulté opposant deux parties, la décision qui est prise a pleine force juridique : 'le droit est dit'”).

⁷⁵¹ See *infra*, paras 618 *et seq.*

⁷⁵² ILA, *Final Report*, para. 27. See also HASCHER, pp. 18 *et seq.*

⁷⁵³ MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage international*, p. 187; SERAGLINI, para. 5, p. 913.

⁷⁵⁴ See SHEPPARD, *Res Judicata and Estoppel*, pp. 229 *et seq.*; BORN, p. 2910. See also VEEDER, p. 74.

⁷⁵⁵ MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage international*, p. 187. See also SERAGLINI, para. 5.

⁷⁵⁶ SERAGLINI, para. 5.

⁷⁵⁷ *Ibid.* See also ILA, *Final Report*, para. 28.

since national arbitration laws generally give no guidance as to how to deal with *res judicata* issues⁷⁵⁸. As was seen in the previous chapter, in the absence of *res judicata* rules in international arbitration law, arbitral tribunals often applied domestic *res judicata* rules designed for litigation.

522. The application of the domestic *res judicata* rules of the arbitral seat disregards the general rule that international arbitral tribunals have no *lex fori*. It is generally considered that an arbitral tribunal does not have the same relation to the arbitral seat as a state court to its legal system⁷⁵⁹. Commenting on the inappropriateness of applying the procedural law of the arbitral seat, Judge Lagergren made the following observation:

“One remarkable feature of [arbitration] [...] was that according to some systems of law the arbitrators were expected to apply as the law of the arbitration procedure the law of the place where the arbitration was held. In modern conditions of international business [...], this often meant little more than hearings in an hotel room in a city which was convenient and accessible to all parties and witnesses: in such circumstances, the law of that place was surely of little relevance”⁷⁶⁰.

523. The domestic procedural laws, substantive laws and conflict-of-laws rules of the place of arbitration do not apply in the same way in international arbitration proceedings as they do in court proceedings held within the country of the arbitral seat⁷⁶¹. Consequently, the domestic *res judicata* rules of the place of arbitration should not merely be transposed to arbitral proceedings seated there⁷⁶².

524. As a matter of principle, the wholesale application by arbitral tribunals of the

⁷⁵⁸ See *supra*, paras 341 *et seq.* See also MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage international*, pp. 186 *et seq.*

⁷⁵⁹ BORN, p. 2911. See also the discussion on the autonomy of international commercial arbitration, *infra*, paras 546 *et seq.*

⁷⁶⁰ Extract reported by GAILLARD, *Aspects philosophiques*, pp. 147 *et seq.*

⁷⁶¹ On the autonomous determination by international arbitral tribunals of the applicable law, independent of the law of the place of arbitration, see, e.g., GOLDMAN, pp. 347 *et seq.* See also LALIVE, *Les règles de conflit de lois*, pp. 155 *et seq.*; RACINE, paras 16 *et seq.*; GAILLARD, *Aspects philosophiques*, pp. 158 *et seq.*

⁷⁶² BORN, p. 2911. See also BREKOULAKIS, p. 207 (“An international arbitration, by definition, has no national forum. Thus, the arbitration award is not the product of a particular national legal system, and, in any case, the seat of arbitration bears no relation to the effect of an arbitral award”); HULBERT, p. 193.

domestic *res judicata* rules of any particular country seems inappropriate⁷⁶³. This is due to several differences between international commercial arbitration and domestic litigation. Domestic *res judicata* rules do not take into consideration the nature and objectives of international arbitration⁷⁶⁴. This point will be discussed further in the second part of this chapter⁷⁶⁵.

1.2. Comparative Law Approach

525. A second possible approach consists in comparing different national laws to determine generally accepted *res judicata* principles common to a majority of states. In the absence of specific *res judicata* rules in national arbitration laws, these general *res judicata* principles would be derived from domestic litigation laws⁷⁶⁶.

526. The application of general *res judicata* principles derived from domestic litigation laws seems *a priori* appropriate in international commercial arbitration to govern the legal relationships between parties from different countries and legal backgrounds, as the parties will be familiar with these principles⁷⁶⁷. Based on the transnational or “inter-cultural”⁷⁶⁸ nature of the international arbitration community, it was said that general principles of law derived from comparative domestic law are predestined to apply in international commercial arbitrations⁷⁶⁹. In addition, where the parties have not chosen a law to govern *res judicata*, they will be less surprised by the application of general *res judicata* principles than by the application of a particular domestic law that they did not choose and that might not be in conformity with what is widely accepted⁷⁷⁰.

527. However, it will be difficult to determine general *res judicata* principles that go beyond the common core delineated in the above research⁷⁷¹. The scope of general *res judicata* principles common to most jurisdictions would therefore be narrow. To find answers to more detailed *res judicata* questions, international arbitrators would have to

⁷⁶³ ILA, *Final Report*, para. 25.

⁷⁶⁴ BORN, p. 2917.

⁷⁶⁵ See *infra*, paras 536 *et seq.*

⁷⁶⁶ See MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage international*, pp. 188 *et seq.*

⁷⁶⁷ VIRALLY, p. 384.

⁷⁶⁸ JARROSSON, *La notion d'arbitrage*, para. 1.

⁷⁶⁹ VIRALLY, p. 384.

⁷⁷⁰ GAILLARD, *Aspects philosophiques*, p. 113.

⁷⁷¹ See *supra*, paras 26 *et seq.*

revert to a particular domestic law and, as a matter of consequence, to the conflict-of-laws approach.

528. Furthermore, even if possible, the appropriateness of the wholesale transposition of a general *res judicata* doctrine developed for domestic litigation to international arbitral proceedings appears doubtful. Such a “legal transplant”⁷⁷² could be a simple way to solve the problem of *res judicata* in international arbitration. However, international commercial arbitration may not be similar enough to domestic litigation with respect to *res judicata* to successfully transplant domestic *res judicata* rules as such into the international commercial arbitration body⁷⁷³. This will be discussed in the second part of this chapter.

1.3. Transnational Approach

529. A third possibility is to formulate autonomous *res judicata* principles that are better adapted to the particularities of international commercial arbitration than domestic rules created for litigation. This approach would seek to provide a uniform set of *res judicata* principles detached from any particular domestic law and taking into consideration the nature and objectives of international commercial arbitration. This approach may best be described as the “transnational approach”⁷⁷⁴.

530. The main difficulty of the transnational approach is to determine the sources and content of such *res judicata* principles. However, there are several advantages to this

⁷⁷² WATSON, p. 21.

⁷⁷³ MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage international*, p. 189.

⁷⁷⁴ There are many different definitions of the notion of “transnational law”. A review of these definitions would be outside the scope of this research. Suffice it to say that according to a broad definition of transnational law it is a “hybrid body of private and public, domestic and international law” (blurring of categories) created by private and public actors (blurring of roles of actors) in a process of cross-fertilization among different national legal systems and international law (blurring of sources)(SCHULTZ, *Transnational Legality*, with reference, *inter alia*, to KOH, *Transnational Public Law Litigation*, p. 2349; KOH, *Why Transnational Law Matters*, p. 745; JESSUP, p. 2.). According to a narrower (systemic) understanding transnational law is made of autonomous legal systems beyond the state which can be reduced neither to a domestic legal system nor to international law as a legal system (autonomy being always relative, never absolute, and therefore admitting the possibility of collaborations with other legal systems, for instance with regard to enforcement by national courts)(SCHULTZ, *Transnational Legality*, with reference to SCHULTZ, *Some Critical Comments on the Juridicity of the Lex Mercatoria*; SCHULTZ, *eBay*; OST/VAN DE KERCHOVE. See also MAYER (*L'autonomie de l'arbitre*, para. 71) according to whom the notion of “transnational law” covers “*toutes les versions proposées d'un tiers ordre juridique, coexistant avec les ordres juridiques étatiques et avec le droit international*”.

approach. First, it would avoid the difficult conflict-of-laws approach. Second, it would avoid the application of a particular domestic law that might be unfamiliar to the parties and the arbitrators. Third, the transnational approach would avoid inappropriate analogies between international arbitration and litigation. It would respect the nature and objectives of international arbitration, as well as the legitimate expectations of the parties with respect to the arbitration process. Fourth, the transnational approach would provide guidance to arbitral tribunals. It would ensure more consistent solutions to *res judicata* which, in turn, would ensure a greater degree of efficiency, fairness, certainty and predictability of the arbitration process. The adoption of the transnational approach has been widely supported by prominent authorities in the field of international arbitration⁷⁷⁵.

531. ILA decided to adopt a mixed model under which transnational rules on certain aspects of *res judicata* would be formulated and remaining issues referred to domestic laws under acceptable conflict-of-laws rules. According to ILA, at present, the development of transnational rules is not feasible for all aspects of *res judicata*. For some aspects, such as the definition of awards that qualify as *res judicata* or the extension of *res judicata* effects to third parties in application of a more lenient “identity of parties” standard⁷⁷⁶, the development of transnational rules is premature and, hence, reference to conflict-of-laws rules is more appropriate⁷⁷⁷.

532. However, ILA considers the adoption of uniform transnational *res judicata* rules to be generally preferable over the application of domestic laws. Wherever feasible, uniform transnational rules should be adopted, as this will by-pass the difficult conflict-of-laws approach. Furthermore, transnational rules generally provide more satisfactory answers assuring procedural efficiency and finality than answers provided by domestic law⁷⁷⁸. This is due to the differences between international commercial arbitration and

⁷⁷⁵ See, e.g., HASCHER, pp. 25 *et seq.*; MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage international*, pp. 190 *et seq.*; SERAGLINI, para. 8; JAROSSON, *L'autorité de chose jugée des sentences arbitrales*, para. B.1.a; BORN, pp. 2889 *et seq.* and p. 2917; SHEPPARD, *The Scope and Res Judicata Effect of Arbitral Awards*, p. 283. See also BREKOULAKIS, pp. 205 *et seq.*; STIER, pp. 325 *et seq.*

⁷⁷⁶ For a list of issues in relation to which ILA refrained from formulating transnational rules, see ILA, *Final Report*, para. 7.

⁷⁷⁷ ILA, *Final Report*, para. 5.

⁷⁷⁸ ILA, *Final Report*, para. 27.

domestic litigation, as well as to the international character of arbitration. While domestic notions of *res judicata* are valid in a domestic setting, they are hardly appropriate in an international context⁷⁷⁹.

533. Based on the above, it is submitted that the transnational approach to *res judicata* before international arbitral tribunals should be adopted. Before formulating any transnational *res judicata* principles, it is necessary to further substantiate this conclusion and to determine the exact modalities for this approach.

2. THE APPROPRIATE APPROACH: TRANSNATIONAL *RES JUDICATA* PRINCIPLES FOR INTERNATIONAL COMMERCIAL ARBITRATION

534. Protagonists of the transnational approach often submit that the application of domestic *res judicata* rules is inappropriate because of the “differences between international commercial arbitration and domestic court dispute settlement, as well as [...] the international character of arbitration”⁷⁸⁰; because of the limited analogy between the position of the judge and the position of the arbitrator⁷⁸¹; or because “national preclusion rules are designed for national court proceedings, and do not necessarily take into account the nature and objectives of the arbitral process”⁷⁸² and arbitral tribunals are “not properly assimilated to the status of a national court at the arbitral seat”⁷⁸³. In short, it is considered that the differences between international arbitration and domestic litigation render the application of domestic *res judicata* rules in arbitration proceedings inappropriate. Transnational *res judicata* principles that consider the particularities and objectives of international commercial arbitration must be formulated.

535. The following analysis will investigate whether, and to what extent, an analogy between international arbitration and domestic litigation is possible for *res judicata* purposes (2.1.). This will enable us to corroborate the conclusion that transnational *res judicata* rules are needed for international arbitration and to determine the sources of

⁷⁷⁹ ILA, *Final Report*, para. 25.

⁷⁸⁰ ILA, *Final Report*, para. 25. See also BRINER, p. 5.

⁷⁸¹ MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage international*, p. 189.

⁷⁸² BORN, p. 2917.

⁷⁸³ *Ibid.*

these rules (2.2.).

2.1. Analogy between International Commercial Arbitration and Domestic Litigation for *Res Judicata* Purposes

536. The question whether, and to what extent, international arbitration can be equated to domestic litigation with respect to *res judicata* requires some introductory remarks on international arbitration (2.1.1.). After looking at some of the fundamental features of international arbitration, the extent (or limits) of a possible analogy between international arbitration and domestic litigation will become clear (2.1.2.).

2.1.1. What is international arbitration?

537. There is no legal (or even generally accepted⁷⁸⁴) definition of arbitration⁷⁸⁵. According to Jarrosson,

“[a]rbitration is the institution by which a third party decides on a dispute between two or more parties by exercising the jurisdictional mandate conferred upon him by the latter”⁷⁸⁶.

538. Similarly, according to Poudret and Besson,

“arbitration is a contractual form of dispute resolution exercised by individuals, appointed directly or indirectly by the parties, and vested with the power to adjudicate the dispute in place of state courts by rendering a decision having effects analogous to those of a judgment”⁷⁸⁷.

539. There are no fundamental divergences between the various definitions given by other legal authors and, in particular, there is no definition which is peculiar to any given country⁷⁸⁸.

540. The resemblances between international arbitration and domestic litigation are apparent. A third party, the arbitrator, decides a dispute between two or more parties by

⁷⁸⁴ KAUFMANN-KOHLER/RIGOZZI, para. 20.

⁷⁸⁵ JARROSSON, *La notion d'arbitrage*, para. 779.

⁷⁸⁶ JARROSSON, *La notion d'arbitrage*, para. 785 (English translation in POUURET/BESSON, para. 2). See also FOUCHARD/GAILLARD/GOLDMAN, para. 7; OPPETIT, *Sur le concept d'arbitrage*, pp. 229 *et seq.*

⁷⁸⁷ POUURET/BESSON, para. 3. See also HUYS/KEUTGEN, para. 23; VAN DEN BERG, p. 44.

⁷⁸⁸ POUURET/BESSON, para. 2. See also JARROSSON, *La notion d'arbitrage*, para. 780.

a decision that is *res judicata*. This arbitrator is essentially a judge⁷⁸⁹. Arbitrators and judges are identical in their status, even though the arbitrator acts in a private capacity, was chosen by the parties and has a temporary mandate. The arbitrator is a private, chosen and temporary judge, but nevertheless a judge “*à part entière*”⁷⁹⁰.

541. The same holds true for the arbitrator’s and judge’s mandate. Their mandates are not merely analogous, but “profoundly identical”⁷⁹¹. The mandates only differ with respect to their sources. The fact that the arbitrators’ mandate is based directly on the parties’ arbitration agreement does not alter the conclusion that arbitrators exercise the same jurisdictional mandate as judges⁷⁹². Likewise, both judgments and awards share the same purpose to finally resolve a given dispute between the parties⁷⁹³. As a matter of consequence (it would seem) national laws generally afford awards *res judicata* effects analogous to those of judgments⁷⁹⁴. Whether, and to what extent, this is appropriate will be determined later in this research. For now, suffice it to say that the recognition by national laws of the *res judicata* effects of awards is evidence that international arbitration is generally considered as functionally equivalent to domestic litigation.

542. However, international arbitration is not domestic litigation. While it is a type of justice, it is not a national justice⁷⁹⁵. Jarrosson declared that it would be both regrettable and erroneous to consider an arbitrator and a national court as identical on the sole basis that both exercise the same jurisdictional mandate⁷⁹⁶. When parties agree to submit their dispute to arbitration, their intention is to remove their dispute from the jurisdiction of domestic courts because domestic courts are “unacceptable, unsuitable or inappropriate for the case”⁷⁹⁷. It would be pointless for parties to replace litigation with another

⁷⁸⁹ See CLAY, paras 73 *et seq.*

⁷⁹⁰ CLAY, para. 236. According to VULLIEMIN, the arbitrator is the “*alter ego*” of the judge (para. 202). *Contra*: MUSTILL/BOYD, p. 223 (“The analogy between arbitrator and judge is tempting, but if pressed too far can lead to false conclusions”).

⁷⁹¹ JARROSSON, *La notion d'arbitrage*, para. 180. See also, *e.g.*, CLAY, para. 112 (with reference to other authorities); MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage international*, p. 189; VULLIEMIN, para. 203; KAUFMANN-KOHLER/RIGOZZI, para. 24.

⁷⁹² JARROSSON, *La notion d'arbitrage*, para. 175.

⁷⁹³ VULLIEMIN, para. 200.

⁷⁹⁴ See *supra*, paras 342 *et seq.*

⁷⁹⁵ It was said that international arbitration “[...] *étant une justice à part entière, n'est pas assimilable à la justice étatique*” (RACINE, p. 305).

⁷⁹⁶ JARROSSON, *L'arbitrage et la Convention européenne des droits de l'homme*, para. 35.

⁷⁹⁷ LEW, *Achieving the Dream*, p. 202.

dispute resolution mechanism identical to litigation. As expressed by Clay, “[...] *si l’objectif est d’être juge à la place du juge, l’arbitre perd sa raison d’être*”⁷⁹⁸.

543. It is not enough to assert that international commercial arbitration is not identical to domestic litigation. The differences must affect the way in which *res judicata* issues should be dealt with before arbitral tribunals. The following section will look at some particularities of international commercial arbitration that may have an impact on *res judicata* in international arbitration.

2.1.2. Fundamental features of international commercial arbitration

544. One characteristic that justifies a departure from domestic *res judicata* rules in favour of transnational rules is that international commercial arbitration is to a great degree autonomous from national legal orders. For the reasons discussed below, it is submitted that international commercial arbitration may be considered as an arbitral legal order separate, but not independent, from national legal orders. This arbitral legal order is founded on transnational law. Accordingly, arbitral tribunals should apply transnational law to *res judicata* issues arising before them.

545. Besides being autonomous (2.1.2.1.), international arbitration is also a contractual (2.1.2.2.) and private (2.1.2.3.) form of dispute resolution. Furthermore, it is flexible, neutral and confidential (2.1.2.4.).

2.1.2.1. International commercial arbitration is autonomous

546. Much has been written on the subject of the autonomy of international commercial arbitration⁷⁹⁹. The idea was famously expressed in 1963 by Goldman who asserted that

“[...] every investigation of a theory corresponding to the nature of international arbitration leads ineluctably to an

⁷⁹⁸ CLAY, para. 62.

⁷⁹⁹ See, e.g., FOUCHARD, *L'autonomie de l'arbitrage commercial international*, pp. 99 *et seq.*; GOLDMAN, pp. 347 *et seq.*; MANN, pp. 157 *et seq.*; VON MEHREN, pp. 215 *et seq.*; MAYER, *L'autonomie de l'arbitre*, pp. 319 *et seq.*; RACINE, pp. 305 *et seq.*; LEW, *Achieving the Dream*, pp. 179 *et seq.*; GAILLARD, *Aspects philosophiques*, pp. 51 *et seq.*; PAULSSON, *Arbitration Unbound*, pp. 358 *et seq.*; KASSIS.

autonomous, not a national, system”⁸⁰⁰.

547. In 1967, Mann took a diametrically opposed position asserting that

“[i]n the legal sense no international commercial arbitration exists. [...] [E]very arbitration is a national arbitration, that is to say, subject to a specific system of national law”⁸⁰¹.

548. According to Mann, international arbitration cannot be autonomous. Arbitral tribunals must be regarded as equivalent to the domestic courts of the arbitral seat. They are both “subject to the local sovereign”⁸⁰².

549. As discussed below, today the autonomy of international commercial arbitration is widely recognised. However, “*l’autonomie est affaire de degrés*”⁸⁰³. Different national laws recognise this autonomy to a greater or lesser extent. Furthermore, the autonomy of international arbitration from national legal systems is never absolute.

550. Racine has described the autonomy of international commercial arbitration as “*notion expansioniste*”⁸⁰⁴; it has steadily increased over the past few decades⁸⁰⁵. The 1958 New York Convention was “the beginning of internationalism in arbitration”⁸⁰⁶, recognising that arbitration agreements, proceedings and awards would have their origin and seek to be effective in different jurisdictions. In line with this internationalism, the New York Convention reduced the role of the arbitral seat⁸⁰⁷. According to Gaillard, the Convention clearly broke with the traditional conception considering international arbitration as equivalent to domestic litigation, drawing its legitimacy solely from the legal order of the arbitral seat⁸⁰⁸.

551. The UNCITRAL Model Law was later adopted “in view of the desirability of

⁸⁰⁰ GOLDMAN, p. 380 (English translation in VON MEHREN, p. 217). As noted by MANN, the Greek scholar, Professor Fragistas, seems to have been the first to suggest that the parties may detach the arbitration from any national legal order and render it “supranational” (See MANN, p. 158).

⁸⁰¹ MANN, p. 159.

⁸⁰² MANN, p. 162.

⁸⁰³ RACINE, p. 308.

⁸⁰⁴ RACINE, p. 305.

⁸⁰⁵ According to FOUCHARD “*toute l’évolution de l’arbitrage au cours des dernières décennies a consisté à renforcer son autonomie par rapport aux lois et aux juges des Etats*” (Municipality of Almelo, p. 507). On the genesis of the autonomy concept, see, e.g., GOODE, pp. 19 *et seq.*; LEW, *Achieving the Dream*, pp. 182 *et seq.*

⁸⁰⁶ LEW, *Achieving the Dream*, p. 189. See also KAUFMANN-KOHLER/RIGOZZI, para. 15.

⁸⁰⁷ GAILLARD, *Aspects philosophiques*, pp. 86 *et seq.*

⁸⁰⁸ GAILLARD, *Aspects philosophiques*, p. 87. See also LEW, *Achieving the Dream*, pp. 187 *et seq.*

uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice”⁸⁰⁹. This need for improvement and harmonisation was based on findings that national laws were often particularly inappropriate for international cases, in particular national laws that equated the arbitral process with court litigation⁸¹⁰.

552. Salient features of the Model Law include the recognition of the doctrines of competence-competence and separability⁸¹¹; the recognition of the doctrine of party autonomy⁸¹²; the limitation and delimitation of local court intervention in international arbitrations⁸¹³; and the recognition of the principle that awards must be recognised as final and binding, with limited grounds for which an award may be set aside or refused recognition or enforcement⁸¹⁴. These salient features are, today, generally-accepted rules of international arbitration. According to Lew, they constitute “a transnational law of international arbitration” supporting “the autonomous nature of arbitration”⁸¹⁵.

553. In light of this changing attitude towards international arbitration, new modern national arbitration laws were adopted. These laws recognise the autonomy of international commercial arbitration at all stages of the arbitration, namely the arbitration agreement, the arbitration procedure and the award⁸¹⁶.

Autonomy at the stage of the arbitration agreement

554. The autonomy of international arbitration is established by the doctrines of competence-competence and separability. While the doctrine of separability renders the arbitration agreement autonomous from the main contract, the doctrine of

⁸⁰⁹ UNCITRAL Model Law on International Commercial Arbitration 1985 - with amendments as adopted in 2006, General Assembly Resolution 40/72 (11 December 1985), p. vii (available at www.uncitral.org).

⁸¹⁰ Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration (available at www.uncitral.org), paras 5 *et seq.*

⁸¹¹ Article 16 (1) UNCITRAL Model Law.

⁸¹² Article 19 UNCITRAL Model Law.

⁸¹³ Article 5 UNCITRAL Model Law.

⁸¹⁴ Articles 34 to 36 UNCITRAL Model Law.

⁸¹⁵ LEW, *Achieving the Dream*, p. 191. For more examples of principles that have acquired the “dignity” of “common law of international arbitration”, see LALIVE, *Transnational (or Truly International) Public Policy*, paras 133 *et seq.*

⁸¹⁶ RACINE, pp. 311 *et seq.*

competence-competence renders the arbitral tribunal autonomous from national courts. Together, both doctrines ensure that all aspects of the dispute, including jurisdiction and merits, will be decided by the arbitral tribunal and not by a court.

555. The autonomy of the arbitration agreement is further corroborated by a current in arbitration case law that applies transnational law to the arbitration agreement in the absence of an express choice of national law by the parties⁸¹⁷. Several state court cases echo this approach⁸¹⁸.

556. Nevertheless, the autonomy of international arbitration with respect to arbitration agreements is not absolute. First, the arbitral tribunal's decision on jurisdiction is generally subject to the control of the supervisory courts of the arbitral seat, unless the parties have waived in advance all setting aside proceedings, as is currently possible under Belgian⁸¹⁹, Panamanian⁸²⁰, Peruvian⁸²¹, Swiss⁸²², Swedish⁸²³ and

⁸¹⁷ HASCHER, p. 25 ; MAYER, *L'autonomie de l'arbitrage*, paras 43 *et seq.* See also the first partial award of 26 June 2001 rendered by an ICC tribunal with seat in Paris between Dallah Real Estate and Tourism Holding Company and the Government of Pakistan ("Judicial as well as Arbitral case law now clearly recognise that, as a result of the principle of autonomy, the rules of law, applicable to an arbitration agreement, may differ from those governing the main contract, and that, in the absence of specific indication by the parties, such rules need not be linked to a particular national law [...], but may consist of those transnational general principles which the Arbitrators would consider to meet the fundamental requirements of justice in international trade. [...] [I]n view of the autonomy of the Arbitration Agreement, the Tribunal believes that such Agreement is not to be assessed, as to its existence, validity and scope, neither under the laws of Saudi Arabia nor under those of Pakistan, nor under the rules of any other specific local law connected or not, to the present dispute. By reason of the international character of the Arbitration Agreement coupled with the choice, under the main Agreement, of institutional arbitration under the ICC Rules without any reference in such Agreement to any national law, the Tribunal will decide on the matter of its jurisdiction and on all issues relating to the validity and scope of the Arbitration Agreement and therefore on whether the Defendant is a party to such Agreement and to this Arbitration, by reference to those transnational general principles and usages reflecting the fundamental requirements of justice in international trade and the concept of good faith in business"; quoted in *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, para. 33).

⁸¹⁸ See, e.g., Cour de Cassation, 20 December 1993, *Municipalité de Khoms El Mergheb v Dalico*, Rev. arb., No. 1 (1994), p. 116 ("[E]n vertu d'une règle matérielle du droit international de l'arbitrage, la clause compromissoire est indépendante juridiquement du contrat principal qui la contient directement ou par référence et que son existence et son efficacité s'apprécient, sous réserve des règles impératives du droit français et de l'ordre public international, d'après la commune volonté des parties, sans qu'il soit nécessaire de se référer à une loi étatique"). See also the decisions of the US Supreme Court in *Scherk v Alberto-Culver Co.* (417 US 506 (1974)) and *Mitsubishi v Soler Chrysler Plymouth* (473 US 614 (1985)). In *Scherk* the court accepted the validity of an arbitration clause, having regard to the international character of the contract, thereby excluding the restrictions imposed by the Security Exchange Act on arbitrability. In *Mitsubishi* the court held that, in antitrust matters, the principle of non-arbitrability does not extend to international contracts (see LALIVE, *Transnational (or Truly International) Public Policy*, para. 57).

⁸¹⁹ Article 1717 (4) Judicial Code.

⁸²⁰ Article 36 Décret-loi No. 5 (8 July 1999), published in Rev. arb., No. 3 (2005), p. 823.

Tunesian⁸²⁴ law⁸²⁵.

557. Second, in some countries, such as Germany, England and Sweden, a party may, in exceptional cases, seise a state court directly with an action concerning the jurisdiction of the arbitral tribunal⁸²⁶. The court is an ordinary court, not a supporting or supervisory court, and the question of the arbitral jurisdiction is the main object of the proceedings, not a preliminary question⁸²⁷. The autonomy of arbitral tribunals with seat in these countries is preserved to the extent that the tribunal may commence or continue the arbitration proceedings while the action is pending before the court⁸²⁸.

558. Third, in most countries the arbitral tribunal has no priority to rule on its jurisdiction over a state court that has been seised of an action on the merits⁸²⁹. The court is entitled, when determining its own jurisdiction, to examine whether there is a valid arbitration agreement. The court has full power to review the arbitration

⁸²¹ Article 63 (8) Peruvian Arbitration Act 2008.

⁸²² Article 192 PILA.

⁸²³ Section 51 SAA 99.

⁸²⁴ Article 78 (6) Tunesian Arbitration Code 1993.

⁸²⁵ See POUDRET/BESSON, para. 457; GAILLARD, *Aspects philosophiques*, pp. 119 *et seq.* As of 1 May 2011, this will also be possible in France under Article 1522 Decree 2011-48.

⁸²⁶ See POUDRET/BESSON, paras 484 *et seq.*

⁸²⁷ POUDRET/BESSON, para. 483.

⁸²⁸ See, *e.g.*, Section 1032 (3) ZPO; Section 32 (4) EAA 96; Section 2 (1) SAA 99. However, pursuant to Section 2 (2) SAA 99, the arbitral tribunal's decision on jurisdiction is not final and binding.

⁸²⁹ French law is one of the view laws to grant arbitral tribunals a priority to rule on their jurisdiction (see Article 1458 NCPC; Article 1448 Decree 2011-48. According to Article 1465 Decree 2011-48 "*Le tribunal arbitral est seul compétent pour statuer sur les contestations relatives à son pouvoir juridictionnel*"). See also Article VI (3) of the 1961 European Convention on International Commercial Arbitration. In Switzerland, the question as to whether arbitral tribunals enjoy a priority to rule on their jurisdiction is controversial (see generally, POUDRET/BESSON, paras 499 *et seq.*). POUDRET/BESSON support the negative effect of competence-competence only in the situation where the court called upon to refer the parties to arbitration is not in the same country as the arbitral seat (para. 520). According to BUCHER, a Swiss court seised of the merits of a dispute should refer the parties to arbitration if the arbitration agreement is *prima facie* valid and this, whether the arbitral seat is in Switzerland or abroad (BUCHER, *L'examen de la compétence internationale par le juge suisse*, pp. 181 *et seq.*). See also Art. 186 (1) *bis* PILA which requires arbitral tribunals with seat in Switzerland to rule on their jurisdiction and, if they accept it, to decide the merits of the dispute, even though an identical action is already pending before a state court or arbitral tribunal. Art. 186 (1) *bis* PILA thus confirms the autonomy of arbitral tribunals with seat in Switzerland at the stage of the arbitration agreement (BUCHER, *L'examen de la compétence internationale par le juge suisse*, p. 192; GAILLARD, *Aspects philosophiques*, p. 144). See also the Parliamentary Initiative by LÜCHER on the modification of Article 7 PILA. The initiative seeks to engrave the negative effect of the *compétence-compétence* principle in the Swiss legal order (the proposed Art. 7 (2) PILA reads as follows: "*En matière internationale, le tribunal suisse, sans égard au siège du tribunal arbitral, sursoit à statuer jusqu'à ce que celui-ci se soit prononcé sur sa compétence, à moins qu'un examen sommaire ne démontre qu'il n'existe entre les parties aucune convention d'arbitrage*").

agreement; it is not limited to a *prima facie* review⁸³⁰. Likewise, the prevailing view is that Article II (3) NYC does not recognise a priority of the arbitral tribunal to rule on its jurisdiction⁸³¹.

Autonomy at the stage of the arbitration procedure

559. International commercial arbitration is autonomous with respect to the law governing both the procedure and the merits of the dispute⁸³². The debate concerning the law governing procedure and merits is now largely closed. It is today almost universally accepted that arbitral tribunals cannot be constrained by the same rules as govern domestic court proceedings⁸³³.

560. Modern arbitration laws no longer require arbitral tribunals to apply the conflict-of-laws rules of the arbitral seat to determine the law governing the merits⁸³⁴. Likewise, arbitral tribunals are not required to apply any particular domestic law to the merits or procedure. Under modern arbitration laws and institutional rules, the merits of the dispute may be governed by “rules of law”⁸³⁵, including rules of non-national origin, such as the *lex mercatoria* or transnational law⁸³⁶. However, under some laws and institutional rules, the arbitral tribunal cannot apply such non-national rules of law

⁸³⁰ See POUURET/BESSON, paras 495 *et seq.* Pursuant to Article 8 (2) UNCITRAL ML and Section 1032 (3) ZPO, the arbitral tribunal may commence or continue the arbitration while the action is pending before the court.

⁸³¹ See POUURET/BESSON, para. 491. However, VAN DEN BERG asserts that, based on the Convention’s pro-enforcement bias, the words “null and void, inoperative or incapable of being performed” should be construed narrowly, and the invalidity of the arbitration agreement should be accepted in manifest cases only (VAN DEN BERG, p.155). Likewise, BUCHER concedes that Article II (3) NYC does not limit the power of the court to a *prima facie* examination of the existence and validity of the arbitration agreement. However, the text of Article II (3) NYC also does not grant to the court full power of review (BUCHER, *L’examen de la compétence internationale*, p. 180).

⁸³² See IDI, *Arbitration Between States*, Article 6 (“The parties have full autonomy to determine the procedural and substantive rules and principles that are to apply in the arbitration. In particular, [...] these rules and principles may be derived from different national legal systems as well as from non-national sources such as principles of international law, general principles of law, and the usages of international commerce”). See also GOODE, p. 20; GAILLARD, *Aspects philosophiques*, p. 94. On the autonomy of international arbitration with respect to the law governing the merits and the procedure see, in particular, GAILLARD, *Aspects philosophiques*, pp. 145 *et seq.*; RACINE, pp. 318 *et seq.*

⁸³³ GOODE, p. 20. See also VON MEHREN, pp. 220 *et seq.*; LALIVE, *Transnational (or Truly International) Public Policy*, paras 36 *et seq.*

⁸³⁴ LEW/MISTELIS/KRÖLL, paras 17-51 *et seq.*

⁸³⁵ See, e.g., Article 1496 NCP (Article 1511 Decree 2011-48); Article 1054 (2) Netherlands CCP; Article 187 PILA; Article 17 (1) ICC Arbitration Rules; Article 22 (3) LCIA Arbitration Rules.

⁸³⁶ On the law applicable to the merits, including the application of non-national rules of law, see POUURET/BESSON, paras 676 *et seq.*; LEW/MISTELIS/KRÖLL, paras 18-1 *et seq.*

without the consent of the parties⁸³⁷.

561. In the absence of party choice, arbitral tribunals may generally conduct the procedure as they deem appropriate, subject to the safeguards of fundamental principles of procedure⁸³⁸.

Autonomy at the stage of the award

562. The autonomy of international arbitration also manifests itself at the stage of the award, but it is not absolute. By virtue of Article V NYC, the courts of the state where recognition or enforcement of the award is sought are entitled to control the award. They may refuse to give effect to an award *ex officio* if the subject matter in dispute is not arbitrable under the law of the enforcement state or if the award violates the public policy of that state⁸³⁹. Likewise, the supervisory courts of the arbitral seat generally have the power to set aside an award rendered there⁸⁴⁰.

563. The autonomy of awards from national legal systems is recognised to the extent that the grounds for which an award may be set aside (or refused recognition or enforcement) are strictly limited and are interpreted narrowly. The recognition of the autonomy of awards is particularly manifest where the *lex arbitri* allows the parties to waive in advance all setting aside proceedings.

564. In France, following the decision of the Paris Cour d'appel in the *Götaverken* case⁸⁴¹, the opinion was voiced to abolish annulment proceedings before the courts of

⁸³⁷ See, e.g., Article 1051 (2) ZPO; Section 46 (3) EAA 96; Article 28 UNICTRAL ML; Article 35 (1) UNCITRAL Arbitration Rules. However, according to LALIVE “modern practice clearly allows the arbitrator, [...] failing a choice by the parties, to disregard any State law” and apply non-national law, on the ground that the contract has its “closest connection” with the international community of merchants (LALIVE, *Transnational (or Truly International) Public Policy*, para. 165).

⁸³⁸ See, e.g., Article 15 (1) ICC Rules; Article 17 (1) UNCITRAL Arbitration Rules; Article 14 LCIA Arbitration Rules.

⁸³⁹ Article V (2) NYC.

⁸⁴⁰ LEW/MISTELIS/KRÖLL, para. 25-10. See, however, Article 1717 (4) Judicial Code 1985 (“The Belgian Court can take cognizance of an application to set aside only if at least one of the parties to the dispute decided in the arbitral award is either a physical person having Belgian nationality or residing in Belgium, or a legal person formed in Belgium or having a branch (une succursale), or some seat of operation (un siège quelconque d'opération) there”). In 1998 Article 1717 (4) Judicial Code was modified to substitute the possibility of waiving setting aside proceedings for the exclusion of such proceedings.

⁸⁴¹ Cour d'appel de Paris, 21 February 1980, *General National Maritime Transport Company Lybia, as legal successor of Libyan General Maritime Transport Organization v AB Götaverken*, YCA, Vol. VI (1981), p. 223.

the arbitral seat on the grounds that the award usually has no connection with the country of the seat⁸⁴². According to Fouchard, the award is not part of the national legal order of the arbitral seat, but is international⁸⁴³. It should only be controlled by the courts of the country where recognition or enforcement is sought⁸⁴⁴.

565. Based on this conception that international awards are not part of any national legal order but are international judicial acts, French courts do not give effect automatically to foreign court decisions annulling an international award. Since 1984 they recognise and enforce awards previously annulled at the arbitral seat if they meet the requirements set out in Article 1502 NCPC⁸⁴⁵.

566. The French conception of the autonomous character of international awards has remained largely isolated⁸⁴⁶. Only in a few cases rendered in Belgium⁸⁴⁷, Austria⁸⁴⁸, the US⁸⁴⁹ and the Netherlands⁸⁵⁰ have courts accepted to give effects to awards

⁸⁴² FOUCHARD, *La portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine*, para. 40 (“pourquoi annuler une sentence si elle n’a pas à être exécutée dans ce pays ?”).

⁸⁴³ See also BOLLÉE (para. 52) who contends that an award constitutes a “fait juridique” with universal existence. As a consequence, the award is not part of any national legal order (“[...] aucun ordre juridique étatique n’est fondamental pour la sentence”). However, according to Bollée awards are also not part of any national legal order. As a consequence, awards cannot qualify as judicial acts (para. 151).

⁸⁴⁴ *Ibid.* See also RACINE, para. 36.

⁸⁴⁵ Cour de cassation, 9 October 1984, *Pabalke Ticaret Limited Sirketi v Norsolor SA*, Rev. arb. (1985), p. 431; Cour de cassation, 10 March 1993, *Polish Ocean Line v Société Jolasry*, Rev. arb. (1993), p. 258 (2nd case). Cour de cassation, 23 March 1994, *Société Hilmarton v Société OTV*, Rev. arb. (1994), pp. 327 *et seq.* The court held in relevant part: “La sentence rendue en Suisse était une sentence internationale qui n’était pas intégrée dans l’ordre juridique de cet Etat, de sorte que son existence demeurait établie malgré son annulation et que sa reconnaissance en France n’était pas contraire à l’ordre public international”. This jurisprudence was followed by the Paris Cour d’appel on several occasions: Cour d’appel de Paris, 14 January 1997, *République Arabe d’Egypte v Société Chromalloy Aero Services*, JDI (1998), p. 750; Cour d’appel de Paris, 10 June 2004, *Société Baryes Agro Industries v Société Young Pecan Company*, Rev. arb. (2006), p. 154; Cour d’appel de Paris, 29 September 2005, *Direction générale de l’aviation civile de l’Emirat de Dubai v Société Internationale Bechtel*, Rev. arb. (2006), p. 695; Cour d’appel de Paris, 18 January 2007, *La société SA Lesbats et fils v Monsieur Volker le docteur Grub* (cited by GAILLARD, *Aspects philosophiques*, p. 117). See also Cour de cassation, 29 June 2007, *Société PT Putrabali Adyamulia v Société Rena Holding et al*, Rev. arb. (2007), pp. 645 *et seq.*

⁸⁴⁶ MOURRE, *Termo Rio et Putrabali*, p. 266.

⁸⁴⁷ Brussels Tribunal of First Instance, 6 December 1988, *Sonatrach v Ford, Bacon & Davis Inc*, ASA Bulletin (1989), p. 213 (confirmed by Brussels Court of Appeal, 9 January 1990, *Journal des tribunaux* (1990), p. 386).

⁸⁴⁸ Oberster Gerichtshof, 20 October 1993, *Radenska v Kajo*, Rev. arb. (1998), pp. 419 *et seq.* (confirmed by Oberster Gerichtshof, 23 February 1998, *Radenska v Kajo*, Rev. arb. (1999), pp. 385 *et seq.*).

⁸⁴⁹ *Chromalloy Aeroservices v The Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996). Since *Chromalloy*, US courts have consistently refused to recognise or enforce awards previously annulled at the arbitral seat: *Baker Marine (Nig.) Ltd v Chevron (Nig.) Ltd*, 191 F. 3d 194 (2d Cir. 1999); *Martin Spier v Calzaturificio Tecnica SpA*, 71 F. Supp. 2d 279 (S.D.N.Y. 1999); *TermoRio SA ESP v Electrificadoría Dela Atlantico SA ESP et al.*, 421 F. Supp. 2d 87 (D.D.C. 2006) (confirmed in *TermoRio SA ESP and LeaseCO Group LLC v Electranta SP et al.*, 487 F. 3d 928 (D.C. Cir. 2007)). However, according to *TermoRio*, the enforcement of previously

previously annulled at the arbitral seat.

Is there an arbitral legal order?

567. Several scholars, mainly in France, have submitted that international commercial arbitration constitutes an arbitral legal order largely independent from national legal orders⁸⁵¹. The existence of an arbitral legal order would have important consequences with respect to *res judicata*. First, awards would be rendered, not in the name of any particular state, but in the name of the arbitral legal order. They would draw their legitimacy and efficacy from their own legal order. The *res judicata* effects of awards would thus have to be determined by the arbitral legal order itself. Another consequence would be that the *res judicata* doctrine would, *a priori*, not apply between state courts and international arbitral tribunals, because the doctrine traditionally is said to apply only between courts and tribunals belonging to the same legal order⁸⁵².

568. The question as to whether international commercial arbitration is a legal order is controversial⁸⁵³. For the reasons given below, it is submitted that it is possible to

annulled awards is still possible where the annulment decision itself violates US public policy.

⁸⁵⁰ Gerechtshof, Amsterdam, 28 April 2009, *Yukos Capital v OAO Rosneft*, YCA, Vol. XXXIV (2009), pp. 703 *et seq.* (upheld by the Dutch Supreme Court in *OAO Rosneft v Yukos Capital*. See VAN HAERSOLTE-VAN HOF). See also Hoge Raad, 26 October 1973, *Société européenne d'études et d'entreprises v République fédérale socialiste de Yougoslavie*, Rev. arb. (1974), pp. 311 *et seq.*

⁸⁵¹ See, e.g., CLAY, paras 237 *et seq.*; RACINE, pp. 335 *et seq.*; GAILLARD, *Aspects philosophiques*, pp. 51 *et seq.* See also VULLIEMIN, paras 382 *et seq.* Although not in express terms, LEW also submits that there is an autonomous arbitral legal order (“International arbitration exists in a sphere or domain independent of and separate from national laws and jurisdictions”)(*Achieving the Dream*, p. 203). According to SHANY, the relation between arbitral tribunals and state courts is somewhere “in the middle”. Although strictly speaking they are not part of the same legal order, they still operate within the same polity, derive their authority from the same legal system and often apply the same law (*Competing Jurisdictions*, p. 116).

⁸⁵² See *supra*, paras 446 *et seq.* See also ILA, *Final Report*, para. 29 and paras 34 *et seq.*; RIVKIN, pp. 292 *et seq.*; DODGE, p. 367.

⁸⁵³ *Contra*: see, e.g., POUDRET/BESSON, para. 112 (“Without entering into a philosophical debate, we consider that the parties’ will is necessarily based on a legal system from which it derives its validity. The *lex arbitrii* builds the foundation (*Grundnorm*) for the effectiveness of the arbitration agreement”); GOODE, pp. 19 *et seq.*; REDONDO, para. 10. See also *Bank Mellat v Helliniki Techniki SA* [1984] 1 QB 291, 301 (“Despite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognise the concept of arbitral procedure floating in the transnational firmament, unconnected with any municipal system of law”); *Coppée Lavalin & Voest-Alpine v Ken-Ren Chemicals* [1994] 2 All ER 449, 458 (“Transnationalism is a theoretical ideal which posits that international arbitration, at least as regards certain types of an arbitral institution arbitration, is a self-contained judicial system, by its very nature separate from national systems of law, and indeed antithetical to them. I doubt whether in its purest sense the doctrine now commands widespread support [...]. At all events it cannot be the law of England [...]”). In its final report ILA did not discuss the question of the existence of an arbitral legal order since the ILA recommendations on *res judicata* and arbitration do not cover the

conceive of international commercial arbitration as an arbitral legal order founded on transnational law. The question as to the existence of an arbitral legal order is a philosophical one, not a scientific one. As was said by Gaillard, it pertains to believe, if not faith, and not to a scientific truth. There is no right or wrong, but only coherence and incoherence, as well as efficiency and inefficiency⁸⁵⁴.

569. There are several definitions of a legal order⁸⁵⁵. It has been defined as a coherent entirety of rules of law that govern an entity, such as a state⁸⁵⁶. According to Kelsen, a legal order is an order of constraint and sanction, and constraint and sanction can only emanate from a state⁸⁵⁷. Accordingly, a legal order is necessarily a national legal order. By contrast, according to Santi Romano's doctrine of the "plurality of legal orders" (*"la pluralité des ordres juridiques"*) there may be other legal orders besides the national legal order. Every legal order is an institution and every institution is therefore a legal order⁸⁵⁸. An institution is defined as *"tout être ou corps social"*⁸⁵⁹. The institution must exist; it must be a visible and permanent entity⁸⁶⁰. It must also constitute a closed and autonomous entity. This does not mean that this entity or institution may not interact with other institutions. It may form a more or less integrated part of another institution and may even be subordinated to another legal order. Hence, the autonomy of an institution must not be absolute. While there are autonomous institutions that are perfectly self-sufficient, others are less autonomous and cooperate with or depend on other institutions⁸⁶¹. Santi Romano uses the term *"relevance"* to describe the relation between different legal orders, *i.e.* to what extent one legal order takes another legal

situation of arbitral tribunals faced with a prior state court judgment. ILA simply states that state courts and international arbitral tribunals "both belong to the same legal order since both are dealing with a relationship between the parties which is governed by private law (and not public international law)". ILA adds "[...] to the extent that state courts or arbitral tribunals may infer indirect support from these Recommendations [...], the requirement of the same legal order is to be interpreted as expressing the view that state courts and arbitral tribunals pertain to the same legal order and that this requirement is met" (para. 35).

⁸⁵⁴ GAILLARD, *Aspects philosophiques*, para. 135.

⁸⁵⁵ The terminology may also vary. For instance, the term "legal system" is also used.

⁸⁵⁶ See CLAY, para. 237; RACINE, para. 48; GAILLARD, *Aspects philosophiques*, para. 43; LAGARDE, paras 5 *et seq.*

⁸⁵⁷ See RACINE, para. 49 with reference to KELSEN; VIRALLY, p. 374.

⁸⁵⁸ ROMANO, p. 19.

⁸⁵⁹ ROMANO, p. 25.

⁸⁶⁰ ROMANO, pp. 25 *et seq.*

⁸⁶¹ ROMANO, pp. 27 *et seq.*

order into consideration. A legal order that is irrelevant to another legal order has no relation with the other legal order. For there to be “*relevance*”, the existence, content and efficacy of one legal order must meet the requirements of the other legal order⁸⁶².

570. According to Gaillard, a legal order is an autonomous and coherent system that disposes of its own legal sources⁸⁶³. A legal order must be self-regulating in the sense that its sources must allow the legal order to resolve all issues concerning it and to coordinate its relations with other legal orders⁸⁶⁴. Gaillard asserts that international arbitration constitutes an arbitral legal order entirely founded on transnational law. This means that the legitimacy of international arbitration is grounded on the collective recognition of international arbitration by national legal orders. The arbitral legal order results from the convergence of national laws. It is a transnational legal order that considers the tendencies flowing from the law and legal activities of the community of states⁸⁶⁵.

571. Gaillard stresses that the transnational law that constitutes the arbitral legal order must be considered as a method rather than a list of rules⁸⁶⁶. The method is the same as under Article of the 38 ICJ Statutes to determine general principles of law. A transnational rule does not have to be unanimously endorsed by all national laws. Rather, the “transnational law method” consists in determining the dominant tendency among national laws. It consists essentially in a systematic use of comparative law⁸⁶⁷. This method allows arbitral tribunals to resolve any issues arising before them. According to Gaillard, there therefore is an arbitral legal order and arbitral tribunals must be considered as organs of this legal order. They render their awards in the name

⁸⁶² ROMANO, p. 106.

⁸⁶³ GAILLARD, *Aspects philosophiques*, p. 95. See also RACINE, para. 49.

⁸⁶⁴ GAILLARD, *Aspects philosophiques*, pp. 112 (“[...] [U]n ensemble structuré de normes ou ‘système’ n’est justiciable, selon nous, de la qualification d’ordre juridique que s’il a vocation à répondre à l’ensemble des questions susceptibles de se poser à ses sujets et à concevoir ses sources et ses relations avec les autres ordres juridiques”) and 114 (“Même cohérent et même complet, un ensemble de normes ne peut, à notre sens, être qualifié d’ordre juridique que s’il est à même de penser ses sources et ses relations avec les autres ordres juridiques”).

⁸⁶⁵ GAILLARD, *Aspects philosophiques*, paras 50 et seq. See also CLAY, paras 258 et seq.

⁸⁶⁶ GAILLARD, *Aspects philosophiques*, para. 54 and paras 61 et seq.

⁸⁶⁷ GAILLARD, *Aspects philosophiques*, para. 60. See also OPPETT, *Philosophie de l’arbitrage commercial international*, p. 817 (“[...] l’arbitrage commercial international, par son esprit d’ouverture comparatiste [...] et par la généralisation de son usage sur la base de principes assez largement acceptés d’organisation et de fonctionnement, tend de plus en plus à l’universalité, qui ne débouche d’ailleurs pas nécessairement sur l’uniformisation [...] l’universalité réside dans la reconnaissance par tous de quelques principes et d’une méthode”).

of their own legal order, and not in the name of any national legal order⁸⁶⁸.

572. Without re-opening the philosophical debate, we support the opinion that international commercial arbitration may constitute an arbitral legal order based on transnational law. Whatever definition is applied, a legal order always seeks to draw its legitimacy from its own sources and relies on its own sources to regulate itself⁸⁶⁹. It is submitted that international commercial arbitration meets these requirements.

573. First, international arbitration disposes of its own sources. The international arbitration community has continuously elaborated a vast body of autonomous rules. International arbitration instruments, such as the New York Convention, the UNCITRAL Model Law and institutional arbitration rules, procedural soft-law formulated by professional organisations (to the extent that they reflect a general consensus), as well as an important international arbitration practice all bear witness to the existence of a common international arbitration law⁸⁷⁰. The existence of a real “*jurisprudence arbitrale*” has been asserted by several scholars⁸⁷¹. In addition, the transnational law method described by Gaillard allows arbitral tribunals to elaborate new rules to deal with all issues arising before them. While international arbitrations are also governed by national arbitration laws, today the influence of any particular national arbitration law on international arbitration is limited.

574. The international commercial arbitration law that makes up the arbitral legal order is characterised by its transnationality. It does not pertain to any particular national legal order, but is comprised of rules that are collectively recognised by the majority of states. International arbitration law is necessarily transnational because it serves an international arbitration community that is itself transnational. It is

⁸⁶⁸ GAILLARD, *Aspects philosophiques*, paras 60 *et seq.*

⁸⁶⁹ VIRALLY, p. 376.

⁸⁷⁰ RACINE, para. 48; LEW, *Achieving the Dream*, p. 196; See also KAUFMANN-KOHLER/RIGOZZI, para. 14.

⁸⁷¹ See, *e.g.*, CLAY, paras 263 *et seq.*; RACINE, para. 48; MAYER, *L'autonomie de l'arbitre*, pp. 426 *et seq.* See also the interim award of 23 September 1982 in the *Dow Chemical* case (ICC Case No. 4131, 1982), p. 136 (“The decisions of these tribunals progressively create caselaw which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively elaborated should respond”).

characterised by a lack of borders⁸⁷². The participants in an international arbitration frequently are from different jurisdictions with conflicting legal, cultural, political and ethical systems⁸⁷³. The arbitral seat usually is in a third jurisdiction. Finally, international arbitrations are often subject to international arbitration rules and the merits are frequently resolved by reference to long and regulatory international contracts, as well as transnational commercial law⁸⁷⁴.

575. Second, it would seem that international commercial arbitration draws its legitimacy not from any particular national legal order, but from the collective recognition by all national legal orders of international arbitration as a fair and efficient mechanism of dispute resolution⁸⁷⁵. Not only is international arbitration globally recognised, it is wanted and encouraged by the majority of states⁸⁷⁶. This attitude towards arbitration is mirrored in national arbitration legislations and the jurisprudence of domestic courts. It is also witnessed by the wide adoption of the New York Convention and the UNCITRAL Model Law.

576. Third, international arbitration is an organised and largely self-regulatory institution. It operates to a great extent independently, with only limited intervention of national arbitration laws and courts⁸⁷⁷. Admittedly, international arbitration is not entirely independent from national legal orders. It needs their recognition and support⁸⁷⁸. However, this does not compromise the existence of an arbitral legal order. A legal order does not necessarily have to be absolutely autonomous and self-sufficient⁸⁷⁹. Expressed in the words of Santi Romano, the arbitral legal order is not in a situation of “*irrelevance*” but “*relevance*” with regard to national legal orders. The arbitral legal order “peacefully”⁸⁸⁰ coexists and cooperates with national legal orders. There are “gangways”⁸⁸¹, “contact points”⁸⁸² or even “tentacles”⁸⁸³ between the arbitral and

⁸⁷² CLAY, para. 262.

⁸⁷³ LEW/MISTELIS/KRÖLL, para. 1-13.

⁸⁷⁴ LEW/MISTELIS/KRÖLL, para. 4-57.

⁸⁷⁵ See OPPETTI, *Philosophie de l'arbitrage commercial international*, p. 815.

⁸⁷⁶ RACINE, paras 58 *et seq.*

⁸⁷⁷ RACINE, paras 45 *et seq.*

⁸⁷⁸ LEW, *Achieving the Dream*, p. 181.

⁸⁷⁹ VIRALLY, p. 378.

⁸⁸⁰ CREMADES, p. 7.

⁸⁸¹ RACINE, para. 4.

national legal orders. These relations should be viewed as an illustration of Santi Romano's "*relevance*"; as relations of collaboration between different legal orders⁸⁸⁴. They should not be viewed as an integration of international arbitration in a national legal order.

577. The existence of annulment proceedings are not necessarily a sign or consequence of the integration of international arbitration in the national legal order of the arbitral seat⁸⁸⁵. The choice of the arbitral seat does not so much witness the parties' intention to subject themselves to the sovereignty of the state of the arbitral seat. The role of the arbitration law of the seat should not be to impose obligations on the parties and arbitrators, a violation of which will be sanctioned by the annulment of the award. Rather, its role should be to support the arbitration in that it supplements institutional or *ad hoc* arbitration rules and gives maximum efficacy to the arbitration proceeding and the award⁸⁸⁶.

578. By determining a seat the parties also determine the domestic courts that are expected to support, not interfere in the arbitration. These courts are associates of the arbitrators. Their task is to ensure the efficacy of the arbitration⁸⁸⁷. This role of supporting and collaborating with the arbitration process also applies with respect to the supervisory courts⁸⁸⁸. Annulment proceedings constitute a mechanism of recourse against an award to ensure that the proceedings and the award meet fundamental standards of justice. They constitute less a tool at the disposal of the state to control arbitrations, but rather a tool serving the parties by providing them with the security and certainty that justice was done. Annulment proceedings are generally undertaken at the initiative of a party, not at the initiative of the supervisory courts of the arbitral

⁸⁸² RACINE, para. 4.

⁸⁸³ LEW, *Achieving the Dream*, p. 203.

⁸⁸⁴ RACINE, para. 50.

⁸⁸⁵ In this sense, see GOODE, pp. 27 *et seq.*

⁸⁸⁶ VULLIEMIN, p. 270; RACINE, para. 34.

⁸⁸⁷ RACINE, para. 34; HOLTZMANN, *L'arbitrage et les tribunaux: des associés dans un système de justice internationale*, p. 253; LEW, *Achieving the Dream*, p. 181.

⁸⁸⁸ See the DAC report on the EAA 96, *re* section 68 ("The test of 'substantial injustice' is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the Court to take action. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate").

seat⁸⁸⁹. The role of the supervisory courts is not to give effect to an award by granting it a seal of approval. The award is created by the arbitrators and it generally is effective once rendered or notified to the parties. It may be enforced under the New York Convention even if the parties choose not to challenge it before the courts of the arbitral seat⁸⁹⁰.

579. The supporting role of the supervisory courts is further illustrated by the fact that the parties generally want to have the possibility to challenge their awards in annulment proceedings. This is illustrated by the failed attempt in Belgium to exclude annulment proceedings between foreign parties⁸⁹¹. In the absence of a centralised international arbitration body⁸⁹², the national courts at the arbitral seat are the appropriate forum for such proceedings. Their authority to annul an award is justified by the choice of the parties, who have chosen the arbitration law and domestic courts of the arbitral seat to support their arbitration. These courts were chosen by the parties in view of their neutrality and reliability⁸⁹³. They are also the appropriate courts to review an award in application of the arbitration law of the arbitral seat⁸⁹⁴.

580. The practice to refuse the recognition and enforcement of annulled awards may also be explained by the collaborating and supporting role of national courts. It supports the arbitral legal order by ensuring its coherence and the harmony of decisions. It appears generally accepted today that Article V (1)(e) NYC merely allows, but does not require, the refusal to recognise or enforce an annulled award. The fact that there is a possibility to recognise and enforce an annulled award is a sign that an annulled award does not cease to exist. Whether or not it would be appropriate to give effects to an annulled award is a different question. It is a question of efficiency and coherence. It does not determine the existence of an arbitral legal order.

⁸⁸⁹ LEW, *Achieving the Dream*, p. 181.

⁸⁹⁰ PINSOLLE, p. 289.

⁸⁹¹ See *supra*, fn 840.

⁸⁹² This was suggested by FOUCHARD, *Suggestions pour accroître l'efficacité internationale des sentences arbitrales*, paras 49 *et seq.*; HOLTZMANN, *A task for the 21st Century*. The establishment of an international arbitration court for resolving disputes over the enforcement of arbitral awards was described as “the impossible dream” by BROWER I/BOWER II/SHARPE, p. 436. See also OGE MID discussion of February 2009 on New Appeal Procedures on Arbitral Awards in Israel.

⁸⁹³ POU DRET/BESSON, para. 518.

⁸⁹⁴ POU DRET/BESSON, para. 1013.

581. Finally, the fact that only states have the necessary coercive power to force parties to comply with an award is not enough to deny the existence of the arbitral legal order. When ordering a party to comply with an award, the courts of the place of enforcement support the arbitration by ensuring its efficacy⁸⁹⁵.

582. As mentioned above, the existence of an arbitral legal order would have consequences with regard to *res judicata*. First, the existence of an arbitral legal order founded on transnational law would justify the transnational approach to *res judicata*. Accepting the existence of an arbitral legal order means acknowledging that this legal order disposes of its own sources to deal with *res judicata* issues⁸⁹⁶.

583. The *res judicata* doctrine traditionally applies only between courts and tribunals belonging to the same legal order. However, the *res judicata* doctrine may apply between arbitral tribunals and national courts, even if they do not belong to the same legal order. According to Shany, the *res judicata* doctrine may apply between national and international courts, *i.e.* between courts belonging to different legal orders, if

“(1) the regulated interactions are not configured in a hierarchical manner; and (2) the judicial bodies involved in jurisdictional interactions are authorized to apply international jurisdiction-regulating rules”⁸⁹⁷.

584. Concerning the first requirement, the *res judicata* doctrine only applies in a horizontal context among parallel courts. Inferior court decisions never bind superior courts⁸⁹⁸. This requirement is met between arbitral tribunals and national courts. The arbitral legal order exists parallelly to the national legal order. Arbitration constitutes an alternative to litigation. The same disputes or issues between the same parties may be submitted before an arbitral tribunal and a national court. Contrary to the final ILA report on *res judicata* and arbitration, we do not consider that arbitral tribunals and national courts belong to the same legal order because “both are dealing with a

⁸⁹⁵ GAILLARD, *Aspects philosophiques*, pp. 114 *et seq.*; RACINE, paras 49 *et seq.* According to Racine, the fact that around 90 percent of awards are estimated to be complied with voluntarily by the parties (see also BORN, fn 4, p. 2880) shows that international arbitration disposes of an “*imperium de juri*”.

⁸⁹⁶ The authority of international arbitrators to apply transnational *res judicata* principles will be discussed in further detail below (see *infra*, paras 618 *et seq.*).

⁸⁹⁷ SHANY, *Regulating Jurisdictional Relations*, pp. 125 *et seq.*

⁸⁹⁸ SHANY, *Regulating Jurisdictional Relations*, p. 126.

relationship between the parties which is governed by private law (and not by public international law)⁸⁹⁹. This merely demonstrates that the arbitral and national legal orders coexist parallelly⁹⁰⁰. Because of this, international arbitration cannot ignore domestic litigation and *vice versa*. The reason why the doctrine of *res judicata* may apply between arbitral tribunals and national courts is not because these courts and tribunals belong to the same legal order. Rather, the doctrine applies despite the fact that they belong to different legal orders, because national courts and arbitral tribunals can be viewed as alternatives to one another⁹⁰¹.

585. There also is no problem of “identicalness of disputes”⁹⁰² between arbitration and court proceedings. In public international law, it has been questioned whether disputes brought before tribunals belonging to different legal orders can ever possess the required degree of similarity for the doctrine of *res judicata* to apply, *i.e.* whether the “same parties” and “same issues” test can ever be met⁹⁰³. It is on this basis that it is often considered that a national judgment cannot constitute a *res judicata* before international courts and tribunals⁹⁰⁴. However, because the same issues may arise between the same parties before arbitral tribunals and national courts, the *res judicata* doctrine should apply despite their belonging to different legal orders.

586. The second requirement is also met as the applicability of the *res judicata* doctrine between arbitral tribunals and national courts is explicitly provided for by international arbitration law and practice⁹⁰⁵. Although Article III NYC does not contain detailed *res judicata* rules, it nevertheless provides for the application of the general principle by requiring national courts to consider awards as binding between the parties. The New York Convention therefore explicitly regulates the interactions between national courts and arbitral tribunals in application of the *res judicata* doctrine.

⁸⁹⁹ ILA, *Final Report*, para. 35.

⁹⁰⁰ See also CLAY, para. 265.

⁹⁰¹ See SHANY, *Regulating Jurisdictional Relations*, p. 126.

⁹⁰² SHANY, *Regulating Jurisdictional Relations*, p. 144.

⁹⁰³ SHANY, *Regulating Jurisdictional Relations*, p. 3 and p. 144. See also, BROWNLIE, p. 50.

⁹⁰⁴ SHANY, *Competing Jurisdictions*, p. 254; BROWNLIE, pp. 50 *et seq.*; PCIJ, *Case Concerning Certain German Interests in Polish Upper Silesia (the Merits)*, cited *supra*, fn 368, p. 20.

⁹⁰⁵ According to SHANY, the doctrine of *res judicata* applies between national and international court judgments “when interactions between those courts have been explicitly or implicitly regulated in ways that confer *res judicata* status on those judgments or deprive them of a preclusive effect” (*Regulating Jurisdictional Relations*, p. 161).

Furthermore, as was seen in Chapter Four of this research, national courts and arbitral tribunals have continuously relied on the *res judicata* doctrine to consider whether they should be bound by prior awards or judgments.

2.1.2.2. *International commercial arbitration is contractual*

587. International arbitration is based on an arbitration agreement between the parties. This agreement is the “foundation stone of international arbitration”⁹⁰⁶. It is the foundation of the arbitral tribunal’s jurisdiction and the validity of the award⁹⁰⁷. The contractual foundation of international arbitration distinguishes it from litigation. While the court’s power to adjudicate necessarily derives from statute⁹⁰⁸, the source of the arbitral tribunal’s jurisdiction is contractual⁹⁰⁹. This has several consequences for the treatment of *res judicata* issues.

588. Arbitrators, unlike judges, do not have a general power to adjudicate. They have a temporary mandate to decide the particular dispute submitted to them. According to Mayer, the problem of *res judicata* first of all presents itself to arbitral tribunals as a question concerning the existence of their jurisdiction⁹¹⁰. When a party requests the arbitral tribunal not to decide a certain dispute or issue on the grounds that it has already been decided by another court or tribunal, the arbitral tribunal has to consider whether and to what extent it has jurisdiction over the dispute or issue in question. The arbitral tribunal does so by examining and interpreting the arbitration agreement⁹¹¹.

589. Mayer argues that, because of the contractual nature of arbitration, arbitrators are not “interchangeable”⁹¹². The jurisdiction of judges is based on a statute and exists independently of an agreement between the parties, except where it is based on a choice-of-court agreement. They exercise a public office and are a manifestation of

⁹⁰⁶ REDFERN/HUNTER/BLACKABY/PARTASIDES, para. 2-01.

⁹⁰⁷ POUDRET/BESSON, para. 149.

⁹⁰⁸ VULLIEMIN, para. 91.

⁹⁰⁹ See FOUCHARD, *L'arbitrage commercial international*, p. 204 (“ce qui distingue essentiellement un arbitre d’un juge, c’est l’origine de sa compétence : celle d’un juge découle de la loi, et s’impose au justiciable ; celle d’un arbitre provient uniquement de l’accord antérieur des deux parties en cause”).

⁹¹⁰ See also SÖDERLUND, p. 305.

⁹¹¹ MAYER, *Litispendance, connexité et chose jugée dans l’arbitrage international*, p. 189. See also CREMADES/MADALENA, p. 539.

⁹¹² MAYER, *Litispendance, connexité et chose jugée dans l’arbitrage international*, pp. 189 et seq.

state power⁹¹³. They all exercise the same mandate and are interchangeable to the extent that they act within the boundaries of their jurisdiction. Since they are interchangeable, it does not matter which one of them decides the dispute⁹¹⁴. This holds true even between judges from different jurisdictions. States will commonly recognise and enforce judgments rendered by foreign courts, safe that certain requirements are met. Where these requirements are met, a foreign judgment will be considered as equivalent to a domestic judgment. By the same token, a foreign judge is considered as equivalent to a domestic judge. They are thus interchangeable⁹¹⁵.

590. By contrast, arbitral tribunals are not interchangeable; neither with another arbitral tribunal⁹¹⁶, nor with another state court. By concluding an arbitration agreement, the parties have conferred upon the arbitral tribunal the mandate to decide a particular dispute. Each arbitral tribunal receives its own specific mandate. Because parties have different preferences, they may - and in many cases will - decide to submit disputes to different courts or tribunals in different places⁹¹⁷.

591. The arbitrators must exercise their mandate fully and in conformity with the arbitration agreement. They would violate their mandate if they do not exercise their jurisdiction whenever there is the slightest interest to do so⁹¹⁸. Arbitral tribunals should deny exercising their jurisdiction - “*le plus grand sacrifice de l’instance arbitrale*”⁹¹⁹ - only rarely⁹²⁰. Hence, the coordination of jurisdictions between different arbitral tribunals or between arbitral tribunals and state courts must always be compatible the arbitral tribunal’s mandate.

592. The arbitration agreement constitutes “the proper frame of reference”⁹²¹ for *res judicata* issues. The parties, when concluding an arbitration agreement, agree to be

⁹¹³ LEW/MISTELIS/KRÖLL, para. 1-8; VULLIEMIN, para. 91.

⁹¹⁴ The relation between a court chosen by a forum selection agreement and a court normally competent in the absence of a choice-of-court agreement should be reserved. As was seen in chapter two of this research, the Hague Convention on Choice of Court Agreements ensures that only the chosen court will decide the dispute covered by the agreement (see *supra*, paras 215 *et seq.*).

⁹¹⁵ MAYER, *Litispendance, connexité et chose jugée dans l’arbitrage international*, p. 190.

⁹¹⁶ See also intervention by REYMOND during the *Débat du 7 février 2001* (HASCHER, p. 38).

⁹¹⁷ LEW, *Parallel Proceedings in International Arbitration*, p. 311.

⁹¹⁸ HASCHER, p. 28.

⁹¹⁹ MAYER, *Litispendance, connexité et chose jugée dans l’arbitrage international*, p. 190.

⁹²⁰ *Ibid.*

⁹²¹ BORN, p. 2911.

bound by the awards rendered during the course of the arbitration. *A contrario*, the awards bind the parties by virtue of their agreement⁹²². Arbitral tribunals should consider the arbitration agreement when dealing with *res judicata* issues. While the agreement will normally be silent with regard to *res judicata*, the agreement will ordinarily express expectations of finality, efficiency and efficacy that must be taken into consideration⁹²³.

2.1.2.3. *International commercial arbitration is private*

593. International arbitration generally is private; the arbitration agreement is private between the parties⁹²⁴. On the basis of this private agreement, the arbitrators render a private decision⁹²⁵, *i.e.* the award.

594. A consequence of the private nature of international arbitration is that the arbitration agreement gives rise to private rights. With respect to *res judicata*, it is sometimes considered that the *res judicata* effect of an award is a private right that results directly from the arbitration agreement⁹²⁶, *i.e.* the right to rely on the award in subsequent proceedings by virtue of the *res judicata* doctrine. When the parties conclude an arbitration agreement, their intention is to obtain the fair and final resolution of their dispute. This intention to finally resolve the dispute was said to be “the purpose and very definition of an agreement to arbitrate”⁹²⁷.

595. The opinion that the *res judicata* effect of an award is a private right conferred on

⁹²² VULLIEMIN, para. 263.

⁹²³ BORN, p. 2911. See also MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage international*, p. 190; SHELL, pp. 663 *et seq.* See also *Fiona Trust & Holding Corp. v Privalov* (2007) UK HL 40 (“Only the agreement can tell you what kind of disputes [the parties] intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational business purpose and an understanding of this purpose will influence the way in which one interprets their language. [...] A proper approach to construction therefore requires the Court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause”. According to Lord Hoffmann, the commercial purpose of the arbitration clause is that all disputes arising between the parties to the transaction should be finally and efficiently disposed of in the same forum, *ie* arbitration).

⁹²⁴ LEW/MISTELIS/KRÖLL, para. 1-10.

⁹²⁵ GAILLARD, *Aspects philosophiques*, p. 62.

⁹²⁶ See BORN, pp. 2891 *et seq* and p. 2911.

⁹²⁷ BORN, p. 2891.

the parties by the arbitration agreement is not generally accepted⁹²⁸. However, it is shared by several leading authorities in international arbitration⁹²⁹.

596. The fact that the parties generally bear the burden of multiple arbitration proceedings supports the argument that *res judicata* is a private right. The state's public interest is reduced to avoiding the costs and time related to the supportive and supervisory powers of the domestic courts⁹³⁰. The parties – not the state – generally bear the inconveniences of multiple arbitration proceedings. If the parties are willing to pay for the adjudication of a dispute that has already been decided by another court or tribunal, there should be no reason to prevent them from doing so.

597. The same holds true for the risk that the second award will not be recognised or enforced in a country where a contradictory award or judgment was already rendered or recognised. If the parties are willing to take this risk, they should be allowed to do so. This is corroborated by the principle of party autonomy. Within the limits of the boundaries set by the *lex arbitri*, the parties have the ultimate control over the arbitration and may determine its details⁹³¹. Since the parties are allowed to control the proceedings and since the parties' interests are primarily at stake, they should have their say with respect to *res judicata*⁹³².

598. If the *res judicata* effect of awards is a private right that derives directly from the arbitration agreement, then the *res judicata* doctrine should not be invoked *ex officio* by the arbitrators⁹³³; this should be left to the parties. Likewise, the parties should be allowed to waive the application of *res judicata* rules⁹³⁴. It also means that the arbitration agreement is the source and foundation of the parties' private rights, including *res*

⁹²⁸ For example, in Switzerland *res judicata* is considered part of public policy (see *supra*, para. 400).

⁹²⁹ See, e.g., ILA, *Final Report*, para. 68; HANOTIAU, *Complex Arbitrations*, p. 248; JARROSSON, *L'autorité de chose jugée des sentences arbitrales*; BORN, p. 2911 (with reference to further authorities under fn 62, p. 2892); SHELL, pp. 662 *et seq.* See also *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041 PC, 1048 ("It is true that [cause of action and issue] estoppels can be described as rules of evidence or as rules of public policy to stop the abuse of process by relitigation. But that is to look at how estoppels are given effect to, not at what is the nature of the private law right which the estoppel recognizes and protects [...]").

⁹³⁰ ILA, *Final Report*, para. 68.

⁹³¹ LEW/MISTELIS/KRÖLL, para. 1-11.

⁹³² In this sense, see KÜHN, pp. 10 *et seq.*

⁹³³ SÖDERLUND, p. 304.

⁹³⁴ ILA, *Final Report*, para. 69; SÖDERLUND, p. 304; LOQUIN, para. 50.

*judicata*⁹³⁵.

2.1.2.4. *Other fundamental features of international commercial arbitration*

599. International commercial arbitration is flexible, neutral and confidential. These features may influence the way in which arbitral tribunals deal with *res judicata* issues.

600. The flexibility of the arbitration procedure is a principal feature of international arbitration. While arbitral tribunals exercise the same task as domestic courts, the jurisdictional framework is different in international arbitration. It is more flexible, simpler and closer to the parties⁹³⁶. The parties are generally entitled to fix the arbitral procedure according to the needs of the particular case⁹³⁷. The study into corporate attitudes and practices towards international arbitration conducted by PWC and the School of International Arbitration revealed that the flexibility of the arbitral procedure is the most widely recognised advantage of international arbitration⁹³⁸. This speaks against the rigid application of domestic *res judicata* rules in international arbitration. It also speaks against transnational *res judicata* rules that imitate the rigidity, technicality and formality of domestic rules. Transnational *res judicata* rules should take into account the parties' expectation of flexibility. This would justify granting international arbitral tribunals certain discretionary powers, a certain "*liberté d'appréciation*"⁹³⁹, when dealing with *res judicata* issues.

601. International arbitration is neutral. It can be established in a neutral venue with no connection with either the parties or the dispute. This neutrality enables arbitral tribunals to apply non-national rules reflecting the nature and objectives of international arbitration, as well as the expectations of the parties⁹⁴⁰. It also explains the tribunal's primary loyalty to the parties. Arbitrators owe their professional duty to the parties. This distinguishes arbitrators from judges who owe a duty to their state to safeguard the state's laws and their underlying policies; they are the keepers of the state's laws and

⁹³⁵ BORN, p. 2911; SHELL, pp. 662 *et seq.*

⁹³⁶ CLAY, para. 271.

⁹³⁷ LEW/MISTELIS/KRÖLL, para. 1-16.

⁹³⁸ PWC/SIA, p. 6.

⁹³⁹ JARROSSON, *L'autorité de chose jugée des sentences arbitrales, sommaire*.

⁹⁴⁰ LEW/MISTELIS/KRÖLL, para. 1-23.

values. The arbitrators, on the other hand, are the keepers of the parties' interests.

602. The fact that international arbitral tribunals owe their duty primarily to the parties may affect the way in which *res judicata* should be dealt with by the tribunals. This was expressed by Hobér in the following terms:

“[S]ubject to requirements of international public policy, however defined, the arbitrators have no obligations, and are not entitled to, take measures in the interest of other persons than the parties to the arbitration in question, even if such measures clearly would promote a sensible solution – from a general point of view – to problems that may have arisen through parallel or multiple proceedings. [...] Therefore, when discussing the options open to arbitrators and the duties of arbitrators to take measures to avoid undesirable effects of parallel or multiple proceedings one must always keep in mind [this limitation] on the powers of arbitrators”⁹⁴¹.

603. The same idea was also expressed in ICC Case No. 10623 of 2001. This case did not concern the *res judicata* effect of a prior award or judgment, but the question whether an arbitral tribunal is bound by an anti-arbitration injunction issued by a court at the arbitral seat. However, the reasoning may apply *mutatis mutandis* in the *res judicata* context, in particular with regard to the question whether an arbitral tribunal should be bound by a prior court decision concerning the jurisdiction of the arbitral tribunal. The arbitral tribunal held that it had discretion as to whether or not it should comply with the injunction. It decided not to suspend the arbitration on the grounds that its primary duty was owed to the parties. The tribunal held in relevant part:

“An international arbitral tribunal is not an organ of the state in which it has its seat in the same way that a court of the seat would be. The primary source of the Tribunal’s powers is the parties’ agreement to arbitrate. An important consequence of this is that the Tribunal has a duty vis à vis the parties to ensure that their arbitration agreement is not frustrated. In certain circumstances, it may be necessary to decline to comply with an order issued by a court of the seat, in the fulfillment of the Tribunal’s larger duty to the parties. [...] The Tribunal owes a duty to the parties to ensure that their agreement to submit disputes to international arbitration is rendered effective even

⁹⁴¹ HOBÉR, p. 250.

where that creates a conflict with the courts of the seat of the arbitration”⁹⁴².

604. Finally, due to the private nature of international arbitration, many consider that arbitration is also confidential. This means that the existence of the arbitration, the subject matter, the evidence, the documents presented in the arbitration and the arbitral tribunal’s decisions cannot be divulged to third parties⁹⁴³. Where the parties in the second arbitration are not the same as in the first arbitration, the confidentiality of the first arbitration could make it impossible for the second tribunal to take the first arbitration into account, even though both arbitrations are closely related⁹⁴⁴. However, where the parties are the same, confidentiality should not constitute an obstacle to the application of *res judicata* principles. This was decided in *Aegis v European Re* where the Privy Council accepted a plea of issue estoppel, explicitly holding that any obligation of confidentiality does not apply as between the same parties in the second arbitration⁹⁴⁵. In this case, Aegis obtained an injunction restraining European Re from divulging the first award in the second arbitration on the grounds that it would breach the confidentiality of the first arbitration. The injunction was later discharged. The Privy Council refused to grant Aegis’ request to reinstate the injunction. It held that the purpose of the confidentiality agreement was to prevent the divulgence of materials which might be of value to persons with interests adverse to Aegis and European Re. However,

“the otherwise legitimate use of an earlier award in a later, also private, arbitration between the same two parties would not raise the mischief against which the confidentiality agreement is directed”⁹⁴⁶.

605. The Privy Council held that a confidentiality agreement could not be construed so as to prevent one party from relying upon a prior award against the other party:

“If the winning party was precluded from referring to the

⁹⁴² ICC Case No. 10623, Award of 7 December 2001, ASA Bulletin, Vol. 21, No. 1 (2003), pp. 82 *et seq.*, paras 128 and 138.

⁹⁴³ LEW/MISTELIS/KRÖLL, para. 1-26.

⁹⁴⁴ REDFERN/HUNTER/BLACKABY/PARTASIDES, para. 1-113 ; JARROSSON, *L'autorité de chose jugée des sentences arbitrales*, para. B(1)(b) ; HASCHER, p. 37.

⁹⁴⁵ SHEPPARD, *Res Judicata and Estoppel*, p. 235.

⁹⁴⁶ [2003] 1 All ER (Comm) 253, 258.

award, it would be unable to enforce it, which would be fundamentally inconsistent with and frustrate the purpose of the arbitration⁹⁴⁷.

2.1.3. Conclusion

606. In relation to the *res judicata* effects of international awards, Jarrosson said that, intuitively, one feels that the *res judicata* effect of awards must take into account the particularity of international arbitration, which lies in particular in its contractual foundation and its flexibility⁹⁴⁸. The above analysis of certain fundamental features of international arbitration confirms this intuition. It has shown that several features of international arbitration influence the way in which arbitral tribunals should deal with *res judicata* issues.

607. First, international commercial arbitration is autonomous from national legal orders to the extent that it may be considered as an arbitral legal order founded on transnational law. The existence of a largely autonomous and transnational arbitral legal order supports the application of transnational *res judicata* principles by international arbitral tribunals.

608. These transnational *res judicata* principles should take into consideration several characteristics of international commercial arbitration. Due to arbitration's contractual and private nature, and because international arbitral tribunals owe their professional duty primarily to the parties, arbitral tribunals should respect the parties' agreements regarding *res judicata*. In the absence of specific party agreements, the tribunal should in any case consider the parties' legitimate expectations of finality, efficiency and efficacy expressed explicitly or implicitly in the arbitration agreement. Due to the importance that parties attach to the flexibility of arbitration proceedings, arbitral tribunals should also enjoy a certain amount of discretion when dealing with *res judicata* issues.

609. However, it must not be forgotten that international commercial arbitration also bears several important resemblances to domestic litigation with respect to *res judicata*.

⁹⁴⁷ [2003] 1 All ER (Comm) 253, 254.

⁹⁴⁸ JARROSSON, *L'autorité de chose jugée des sentences arbitrales* ("Intuitivement, l'observateur sent que l'autorité de la chose jugée de la sentence ne pourra pas échapper à une certaine originalité, inhérente à cette forme particulière de justice qu'est l'arbitrage, qui se caractérise notamment par son origine conventionnelle et sa procédure peu formaliste").

There is a profound analogy between these two mechanisms of dispute resolution for purposes of *res judicata*.

2.2. Sources of Transnational *Res Judicata* Principles

610. If the existence of an arbitral legal order is admitted, then international arbitral tribunals should examine the sources pertaining to this legal order to determine the effects to be given to prior awards and judgments in the arbitration. Hence, the primary source for transnational *res judicata* rules is international commercial arbitration law and practice.

611. In Chapter Four it was determined that international arbitration law does not provide any detailed *res judicata* rules for arbitral tribunals. Likewise, save for few exceptions, no clear *res judicata* rules emerge from international arbitration practice. However, international arbitration law and practice nevertheless lay down certain transnational standards for *res judicata*, which require arbitral tribunals to give certain *res judicata* effects to prior awards and judgments when certain requirements are met.

612. With respect to awards, the *res judicata* effect of awards forms an inherent part of international arbitration. It is the objective of every arbitration⁹⁴⁹. National arbitration laws and international arbitration instruments require the recognition of the binding effects of awards. Article III NYC requires courts in Contracting States to recognise awards as binding. Although the New York Convention is not directly applicable before international arbitral tribunals⁹⁵⁰, it nevertheless establishes certain standards that arbitral tribunals must consider.

613. Although international arbitration law generally is silent about the *res judicata* effects of prior judgments in international arbitrations, arbitration case law has shown on several occasions that prior judgments may operate as *res judicata* in arbitration proceedings and a failure to give *res judicata* effects to a prior judgment may result in the award being annulled or refused recognition or enforcement⁹⁵¹.

⁹⁴⁹ BORN, p. 2893; SHELL, p. 665.

⁹⁵⁰ POUURET/BESSON, para. 72.

⁹⁵¹ See BORN who refers to several national court decisions rendered in France, Switzerland and the US

614. The transnational *res judicata* rules to be applied by arbitral tribunals must be developed in light of common international arbitration law that derives from national arbitration legislation and court practice, as well as international arbitration instruments, such as institutional arbitration rules and international arbitration conventions. The common international arbitration law may comprise rules and guidelines formulated by professional organisations, such as the ILC reports and guidelines, to the extent that they enjoy a general acceptance in international arbitration practice. Transnational *res judicata* rules may also be developed in light of dominant tendencies emerging from international arbitration practice⁹⁵². They must take into consideration the particularities and objectives of international arbitration. In particular, they must pay close attention to the legitimate expectations of the parties. When choosing international arbitration, the parties will always expect the final, fair and efficient resolution of their dispute outside the realm of national courts. They will also expect a neutral arbitral tribunal freed of the constraints of domestic laws and rigid procedures.

615. If international arbitral tribunals should not apply any particular domestic *res judicata* rules designed for judgments, this does not mean that transnational *res judicata* rules for international arbitration may not usefully build on such rules. There are important similarities between arbitration and litigation with respect to *res judicata*. The policies of fairness, efficiency, upholding the integrity of the adjudication process and effectuating the parties' intentions apply in international arbitration, as well as in litigation⁹⁵³. International arbitration law and practice has developed not so much by the implementation of completely new and specific rules, but by the adaptation of traditional rules to new situations emerging from international commerce. Oppetit described this phenomenon as "*acculturation juridique*"⁹⁵⁴.

616. As mentioned earlier, the application of general principles derived from domestic *res judicata* rules appears *a priori* appropriate in international arbitration⁹⁵⁵. The

(pp. 2915 *et seq.*). See also, *e.g.*, CRCICA Case No. 67/1995; ICC Case No. 6363, 1991; ICC Case No. 6535, 1992.

⁹⁵² See GAILLARD, *Aspects philosophiques*, para. 118.

⁹⁵³ BORN, p. 2915. See also *supra*, paras 331 *et seq.*

⁹⁵⁴ OPPEIT, *Philosophie de l'arbitrage commercial international*, pp. 815 *et seq.* It has also been referred to as "legal transplant" (See *supra*, para. 528).

⁹⁵⁵ See *supra*, para. 526.

parties will be familiar with transnational *res judicata* rules that are inspired by general domestic *res judicata* rules. The PWC/SIA study into corporate attitudes and practices towards international arbitration established that the most common explanation for avoiding transnational litigation is the parties' anxiety about litigating under a foreign law before a court far from home, with a lack of familiarity with local court procedures and language⁹⁵⁶. Formulating transnational *res judicata* rules inspired by domestic litigation rules would avoid the application of a foreign, unfamiliar and possibly unexpected law to *res judicata*. At the same time, the parties would be familiar with the principles applied and the outcome would arguably be more foreseeable to the parties⁹⁵⁷. In addition, due to the wide-spread recognition in national laws of the *res judicata* doctrine, the parties will likely expect the application of *res judicata* rules that resemble domestic *res judicata* rules to a certain degree. When choosing international commercial arbitration, parties generally do not seek to be judged differently than in court proceedings, in particular in application of non-legal principles based on moral and equity. They expect to be judged in application of similar legal standards, albeit in a different legal environment. The exception is where the parties authorise the arbitral tribunal to act as *amiable compositeur* or *ex aequo et bono*⁹⁵⁸.

617. There are no serious reasons why international arbitral tribunals should not apply similar *res judicata* rules as national courts⁹⁵⁹. Transnational *res judicata* rules for international arbitral tribunals could be inspired by the ALI/UNIDROIT Principles of Transnational Civil Procedure which apply primarily in transnational commercial disputes and the aim of which is precisely to reduce uncertainties and anxieties related to litigation under unfamiliar procedural systems⁹⁶⁰. Another (it was said the “most obvious”⁹⁶¹) source of inspiration is EC Regulation No. 44/2001, together with the ECJ’s case law⁹⁶². Inspiration could also be sought in the public international law

⁹⁵⁶ PWC/SIA, p. 5.

⁹⁵⁷ GAILLARD, *Aspects philosophiques*, p. 113.

⁹⁵⁸ On the question whether parties in international arbitration seek to be judged in application of a *jus naturalis*, see CLAY, pp. 222 *et seq.*

⁹⁵⁹ BORN, p. 2915.

⁹⁶⁰ See *supra*, paras 229 *et seq.*

⁹⁶¹ SHEPPARD, *The Scope and Res Judicata Effect of Arbitral Awards*, p. 265.

⁹⁶² See *supra*, paras 195 *et seq.*

doctrine of *res judicata* which was developed on the basis of domestic *res judicata* rules⁹⁶³. In any event, however, the extent to which transnational *res judicata* principles may be built on domestic litigation rules on *res judicata* must be limited to avoid making arbitration look like litigation and compromise its flexibility. Domestic litigation rules on *res judicata* may provide “the starting point, not the end result, of analysis”⁹⁶⁴.

2.3. Legal Basis for the Application of Transnational *Res Judicata* Principles

618. The question arises as to the legal basis on which international arbitrators could apply transnational *res judicata* principles in the absence of a choice by the parties⁹⁶⁵.

619. Based on the autonomy of international commercial arbitration, it may be argued that arbitral tribunals are not required to apply any particular domestic *res judicata* rules, unless instructed to do so by the parties. *A contrario*, arbitral tribunals may apply transnational rules in the absence of an express choice of a national law by the parties.

620. According to Hascher *res judicata* is a manifestation of the arbitrators’ jurisdictional authority (“*une manifestation du pouvoir juridictionnel de l’arbitre*”⁹⁶⁶). This authority, in turn, is based on the common will of the parties as expressed in the arbitration agreement. By reference to this common will the arbitrators may determine the existence and scope of their jurisdiction and, thus, the question of *res judicata*⁹⁶⁷.

621. It was seen above that an important current in international arbitration case law considers that arbitration agreements may be governed by transnational law in the absence of an express choice of national law by the parties⁹⁶⁸. Hascher argues that it should be possible to adopt the same approach with regard to *res judicata*⁹⁶⁹. This would

⁹⁶³ See *supra*, paras 236 *et seq.*

⁹⁶⁴ BORN, pp. 188 *et seq.* (“[...] it is true that the field of international arbitration draws essential doctrine and rules from contract law and from the law of civil procedure and judgments. But in many cases, particularly in international matters, these disciplines are at most analogies, providing the starting point, not the end result, of analysis. In all cases, it remains essential to categorize and treat arbitration as a distinctive and autonomous discipline, specially designed to achieve a particular set of objectives, which other branches of private international law fail satisfactorily to resolve”).

⁹⁶⁵ See ALFORD.

⁹⁶⁶ HASCHER, p. 25.

⁹⁶⁷ *Ibid.*

⁹⁶⁸ See *supra*, para. 555

⁹⁶⁹ HASCHER, p. 25.

be corroborated by the analysis of arbitration practice in chapter four which has shown a recent tendency among arbitral tribunals to replace the strict application of domestic *res judicata* rules by more pragmatic solutions that further the objectives of the parties' arbitration agreement⁹⁷⁰. Furthermore, according to Hascher, it is accepted that the related doctrine of *lis pendens* is governed by the law governing the arbitration agreement, because *lis pendens* impacts on the agreement's scope and efficacy⁹⁷¹. The same argument should apply to *res judicata*.

622. If arbitral tribunals do not have a *lex fori* and are not organs of a state but of an arbitral legal order, then they are also not bound by any national system of private international law. According to Lalive, they should however be bound by transnational law, comprised of generally accepted principles⁹⁷². The doctrine of *res judicata* is widely recognised, either as a custom or a general principle of law. This means that *res judicata* principles are part of the transnational law that international arbitrators must apply, unless the parties have expressly chosen a national law to govern *res judicata*, or have waived the application of *res judicata* principles.

623. According to Mayer, when determining the existence and scope of their jurisdiction, international arbitrators are not bound to apply the rules of any legal order (national or otherwise). However, the arbitrators' autonomy is limited by practical considerations, in particular the efficacy of their award⁹⁷³. Another consideration is the advantage of creating transnational rules for international arbitration and to thereby contribute to the harmonisation of international arbitration law⁹⁷⁴. According to Mayer, *res judicata* should be governed by such rules⁹⁷⁵.

624. Admittedly, the above line of argumentation is not generally accepted.

⁹⁷⁰ See *supra*, para. 452.

⁹⁷¹ HASCHER, p. 25 with reference to ICC Case No. 6840, 1991 (“*L'autonomie juridique de la convention d'arbitrage entraîne la création d'une règle matérielle spéciale aux termes de laquelle aucune concurrence ne peut intervenir entre deux ordres juridiques qui ne sont pas également compétent*”).

⁹⁷² LALIVE, *Transnational (or Truly International) Public Policy*, paras 43 *et seq.* and para. 152. See also *Mitsubishi v Soler Chrysler Plymouth*, 473 US 614, 636 (1985) (“The international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties”).

⁹⁷³ MAYER, *L'autonomie de l'arbitre*, paras 67 *et seq.*

⁹⁷⁴ MAYER, *L'autonomie de l'arbitre*, paras 95 *et seq.*

⁹⁷⁵ MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage international*, pp. 190 *et seq.*

However, the application of transnational *res judicata* rules is also supported by most modern national arbitration laws and institutional rules. As was seen above, modern arbitration laws and institutional rules generally do not require international arbitrators to apply any particular domestic law to the merits or procedure, but allow the application of non-national rules of law⁹⁷⁶.

625. If (as is argued) *res judicata* pertains to procedure⁹⁷⁷, international arbitrators may apply transnational *res judicata* rules because (in the absence of party choice) they may generally conduct the procedure as they deem appropriate⁹⁷⁸.

626. However, the application of transnational *res judicata* principles may not always be possible if *res judicata* is considered to pertain to substance. Under some arbitration laws and institutional rules, arbitrators cannot apply non-national rules of law without the consent of the parties⁹⁷⁹. Likewise, in the absence of party choice, arbitrators sometimes can apply non-national law only if the dispute has its closest connection with this body of law⁹⁸⁰. This has been held to be the case in exceptional circumstances where the contract in dispute is connected to several countries and it is impossible for the arbitrators to establish the “closest connection” with any jurisdiction in particular⁹⁸¹.

3. CONCLUSION

627. Arbitral tribunals generally can and should apply transnational *res judicata* rules in the absence of an express choice of national law by the parties. The conflict-of-laws approach and the comparative law approach are not appropriate to satisfactorily address *res judicata* issues before international arbitral tribunals. By contrast, the

⁹⁷⁶ See *supra*, paras 560 *et seq.*

⁹⁷⁷ See *supra*, para. 517.

⁹⁷⁸ See *supra*, para. 561.

⁹⁷⁹ See *supra*, para. 560. It has been argued that the parties are presumed to have chosen transnational law if they have not expressly chosen a national law to govern their dispute (see MAYER, *L'autonomie de l'arbitre*, para.73). MUSTILL refuted this suggestion in pertinent terms: “This striking proposition ignores the possibility that the choice of a national law was so obvious as not to be worth mentioning, or that the parties never thought about the matter at all. Moreover, even if the parties had in fact disagreed, there seems no warrant for inferring unanimity in favour of ruling out all potentially relevant national systems and substituting an anational system of which only the smallest minority of businessmen can ever have heard” (p. 101).

⁹⁸⁰ See, *e.g.*, Article 187 (1) PILA.

⁹⁸¹ KAUFMANN-KOHLER/RIGOZZI, para. 644; MAYER, *L'autonomie de l'arbitre*, para. 74.

transnational approach is appropriate for several reasons. The transnational approach avoids inappropriate analogies between arbitration and litigation. Transnational *res judicata* rules may take into account the nature and objectives of international arbitration, as well as the legitimate expectations of the parties. Particular attention should be paid to the parties' arbitration agreement and to important expectations as to efficiency, flexibility and finality. Finally, a coherent and harmonised approach towards *res judicata* before international arbitral tribunals could ensure more consistent solutions to *res judicata*. This in turn would provide an increased level of efficiency, fairness, certainty and predictability of the arbitration process.

628. International arbitral tribunals should revert to the transnational law method to determine *res judicata* principles. This means that international arbitrators must look for generally (not unanimously) accepted principles. Such general principles should be developed in light of international arbitration law and practice. To the extent that they respect the particularities, nature and objectives of international commercial arbitration, transnational *res judicata* rules for international arbitral tribunals may build on domestic *res judicata* rules.

CHAPTER 6

Transnational *Res Judicata* Principles for International Arbitral Tribunals

629. The objective of this chapter is to suggest *res judicata* principles for international arbitral tribunals based on transnational law. Given the lack of a universal *res judicata* doctrine and the uncertainty presently existing in international arbitration law and practice as to how to deal with *res judicata* issues, a codification of transnational *res judicata* rules is premature. Therefore, the goal is to suggest possible solutions to the problem of *res judicata* before international arbitral tribunals. Ideally, over the years a *jurisprudence constante* with respect to *res judicata* will emerge from arbitration case law.

630. As will be discussed below, arbitral tribunals should apply essentially the same *res judicata* principles to prior judgments and awards. Besides the advantage of simplicity, this is justified by the several similarities between arbitration and litigation with respect to *res judicata*. There appears to be no reason to apply substantially different *res judicata* rules to judgments and awards.

631. However, several differences between arbitration and litigation must be taken into consideration. In order to better take account of these differences, as well as for reasons of clarity, the following analysis will deal with *res judicata* issues arising out of prior judgments (1.) and awards (2.) separately. After considering the constituent elements of a *res judicata*, the analysis will determine the scope of the *res judicata* effects to be afforded to prior judgments and awards and, finally, the requirements that must

be met for prior judgments and awards to operate as a *res judicata* in arbitration proceedings. Transnational *res judicata* principles for international arbitral tribunals will be formulated in the conclusion to this chapter, building on the ILA recommendations on *res judicata* and arbitration (3).

1. RES JUDICATA IN CASE OF PRIOR STATE COURT JUDGMENTS BEFORE INTERNATIONAL ARBITRAL TRIBUNALS

632. As a preliminary remark it should be considered whether, and to what extent, the national law of the country where the prior judgment was rendered must be applied or taken into account. The question is to what extent the *res judicata* effects of a prior judgment may be governed by transnational rules.

633. There are two alternative approaches in transnational litigation to determine the preclusive effects of a prior judgement in subsequent proceedings in another country. According to the doctrine of extension of effects a judgment must be accepted in the recognising state with the original effects it would have in the state in which it was rendered. It is thus the law of the country where the first judgment was rendered that will determine the judgment's preclusive effects in the subsequent proceedings. The underlying rationale is that full faith and credit must be shown to judgments rendered in another state⁹⁸². This appears to be the approach favoured (at least implicitly with regard to claim preclusion) under the EC Regulation 44/2001⁹⁸³. It is also the approach adopted in the US by the statute implementing the full faith and credit clause of the American Constitution⁹⁸⁴.

634. By contrast, according to the doctrine of equalisation of effects, the effects of a foreign judgment are equalised with the effects that are obtainable before the courts of the recognising state. This approach is based on the premise that the recognising state has the right within its territory to afford the same preclusive effects to the recognised

⁹⁸² BARNETT, para. 7.10.

⁹⁸³ See *supra*, para. 213. According to RIGAUX/FALLON, the doctrine of extension of effects is followed in Belgium (para. 10.44).

⁹⁸⁴ LASOK/STONE, p. 290 who refer to 28 U.S. Code (1964), s. 1738, implementing Article IV (1) of the 1789 US Constitution.

foreign judgment as it would give a corresponding national judgment⁹⁸⁵. In England, the doctrine of equalisation of effects applies at common law to foreign judgments recognised under the traditional rules⁹⁸⁶. It may be justified by the view that *res judicata* can be described as a rule of evidence and is hence part of the law of the recognising state⁹⁸⁷. This is also the approach followed by the ALI/UNIDROIT Principles of Transnational Civil Procedure⁹⁸⁸.

635. While Swiss law appears to follow the doctrine of extension of effects⁹⁸⁹, in France the question is controversial⁹⁹⁰. Mayer and Heuzé favour the doctrine of extension of effects. According to these authors, the law of the country where the first judgment was rendered determines whether a prior decision may operate as a *res judicata* in subsequent proceedings in France. This law will also limit the preclusive effects of the prior decision in France as a decision cannot have more or broader preclusive effects abroad than it would have in its country of origin⁹⁹¹. For Mayer, the same applies in international arbitration. The law of the country where the prior judgment was rendered limits the judgment's preclusive effects in a subsequent arbitration⁹⁹².

636. Arbitral tribunals should follow the doctrine of equalisation of effects to determine the effects of a prior judgment in arbitration proceedings. This means that the effects to be given to a prior judgment in an arbitration should be determined autonomously, taking into consideration the particularities and objectives of international arbitration. It also means that prior judgements should be given

⁹⁸⁵ BARNETT, para. 7.09.

⁹⁸⁶ BARNETT, para. 7.09.

⁹⁸⁷ BARNETT, para. 2.33 ; TAPPER, p. 92. See also *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041 PC, 1048 (“It is true that estoppels can be described as rules of evidence [...]”).

⁹⁸⁸ Principle 30, comment P-30B.

⁹⁸⁹ See *supra*, para. 403.

⁹⁹⁰ See MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage international*, p. 187. Huet seems to favour the doctrine of equalisation of effects (see HUET, para. 126). According to this author, *res judicata* is governed exclusively by the *lex fori* of the court seised of the second proceedings. If *res judicata* was above all a presumption of truth, then the law of the country where the prior judgment was rendered would clearly have to govern *res judicata*. However, for Huet *res judicata* is less a presumption of truth than a means to put an end to proceedings and avoid inconsistent judgments. It is for the law of the country where the *res judicata* is invoked to determine whether and to what extent a prior foreign judgment may preclude subsequent proceedings in that country. In this sense, see also BOLLÉE, paras 337 and 345 *et seq.*

⁹⁹¹ MAYER/HEUZÉ, para. 403.

⁹⁹² MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage international*, p. 199.

substantially the same preclusive effects in an arbitration as prior awards. It does not mean, however, that arbitral tribunals should ignore the law of the country where the prior judgment was rendered. Reference to this law is in line with the judgment's origin in this national legal order and may well be expected by the parties. The arbitrators may consider this law to determine whether and to what extent the decision could operate as a *res judicata* under that law.

637. If the existence of an arbitral legal order is accepted, then this arbitral legal order should determine whether, and to what extent, it will give preclusive effects to prior judgments. It is true that the prior judgment is part of the national legal order of the country where it was rendered and this national legal order has the authority to specify which types of judgment can have *res judicata* effect and to what extent. The state has the authority to restrict the jurisdiction of its courts by prohibiting them to reconsider matters that have already been finally decided by another court. However, this authority is limited to its territory⁹⁹³. It fades once the judgment leaves the confines of the national legal order and is adopted by another legal order. At this moment the receiving legal order has the greater interest to determine whether, and to what extent, a prior judgment should have *res judicata* effects in accordance with its own interests and objectives.

638. The full faith and credit argument cannot be relied upon to support the application of the doctrine of extension of effects. This argument is often relied upon in federal structures, namely in case of judgments rendered in sister states in the US or within the system of the EC Regulation 44/2001⁹⁹⁴. The full faith and credit argument is appropriate in these structures as they are built on mutual trust between sister states and Member States, as well as on the premise that the judges of sister/Member States are interchangeable between each other. However, the same is not true in international arbitration where arbitral tribunals cannot be considered as interchangeable with state courts⁹⁹⁵.

639. In addition, the doctrine of equalisation of effects would ensure greater

⁹⁹³ VULLIEMIN, p. 50.

⁹⁹⁴ BARNETT, para. 7.10.

⁹⁹⁵ See *supra*, paras 589 *et seq.*

uniformity in the application of transnational *res judicata* principles by international arbitral tribunals. Under the doctrine of extension of effects, any transnational *res judicata* principles would always apply in conjunction with the domestic *res judicata* rules of the country where the prior judgment was rendered. By contrast, under the doctrine of equalisation of effects arbitral tribunals would apply the same *res judicata* principles no matter where the prior judgment was rendered. The question whether, and to what extent, a prior judgment has *res judicata* effects in arbitration proceedings would not vary depending on the country where the prior judgment was pronounced. The advantages would not only be greater uniformity and simplicity in the application of transnational *res judicata* rules, but also greater certainty and predictability for arbitration users.

640. The doctrine of equalisation of effects could also help arbitral tribunals protect the arbitration process. Arbitral tribunals would have the authority to determine themselves whether and to what extent they can and should exercise their jurisdiction, without being tied to the *res judicata* rules of the law of the country where a prior judgment was rendered.

641. Notwithstanding the above, to protect the efficacy of their award, arbitral tribunals should always take account of the law of the arbitral seat. Even if arbitral tribunals should in principle not be constrained by the law of the arbitral seat when dealing with *res judicata* issues, ignoring this law may prove imprudent in practice as it may lead to the setting aside of the award, which in turn would constitute a waste of valuable resources.

1.1. Constituent Elements of a *Res Judicata*

642. While there does not appear to be a universally accepted definition of a decision capable of operating as a *res judicata* in later proceedings, there seems to be a certain agreement on the constituent elements of a *res judicata*. Although expressed in different terms, a *res judicata* usually is a judicial decision rendered by a judicial court or tribunal that finally and conclusively determines a legal dispute between the parties.

1.1.1. A judicial decision

643. Arbitral tribunals should normally be able to verify this element without major

difficulties or any particular regard to the law of the country where the prior decision was rendered. A judicial decision can usually be described as any judicial adjudication that determines a legal dispute between the parties⁹⁹⁶.

1.1.2. A judicial tribunal

644. In order to qualify as a *res judicata*, a judgment must be rendered by a judicial tribunal. The court or tribunal must have the authority to decide a legal dispute by a final judgment. It may be necessary to consult the law of the country where the prior court is located to determine whether this is the case.

1.1.3. A final and conclusive decision

645. A prior decision generally can only operate as a *res judicata* if it is final and conclusive for *res judicata* purposes⁹⁹⁷. This finality requirement is expressed in different terms in different jurisdictions. However, finality usually means that the decision puts an end to the court's jurisdiction over the decided matter. The decision is binding on the parties and cannot be re-opened in the same court by further proceedings⁹⁹⁸.

646. If there appears to be some consensus on the meaning of the finality requirement, there is no consensus on the precise moment when a decision becomes final and conclusive for *res judicata* purposes⁹⁹⁹.

647. While English courts generally verify the *res judicata* status of a foreign judgment by reference to English *res judicata* criteria, the requirement that the foreign judgment be final and conclusive is assessed according to the law of the country where the judgment was rendered. This was made clear by the House of Lords in *Carl Zeiss (2)*¹⁰⁰⁰, where

⁹⁹⁶ See *supra*, paras 39, 120 and 157.

⁹⁹⁷ HABSCHEID, *L'autorité de la chose jugée en droit comparé*, p. 186.

⁹⁹⁸ See *supra*, paras 42 *et seq.*, 84 *et seq.*, 122 *et seq.*, 162 *et seq.*, 256 *et seq.*

⁹⁹⁹ See *supra*, para. 184.

¹⁰⁰⁰ *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, HL. The House of Lords endorsed its decision in *Nouvion v Freeman* (1889) 15 App Cas 1, HL. In *Carl Zeiss*, Lord Reid said: "When we come to issue estoppel, I think that by parity of reasoning we should have to be satisfied that the issues in question cannot be relitigated in the foreign country. In other words it would have to be proved in this case that the courts of the German Federal Republic would not allow the re-opening in any new case between the same parties of the issues decided by the Supreme Court in 1960, which are now said to found an estoppel here. There would seem to be no authority of any kind on this matter, but it seems to me to verge on absurdity that we should regard as conclusive something in a German judgment which

their Lordships ruled that a foreign judgment will only operate as a *res judicata* in England if it is final and conclusive before the foreign court that rendered it and according to the law of the country where it was pronounced; there is no provision in English law as to the finality of a foreign judgment in its country of origin¹⁰⁰¹.

648. For the same reason this solution should also be adopted by arbitral tribunals. It is for the state in whose territory the judgment was pronounced to determine the moment at which a national court judgment becomes final and conclusive for the parties and the court that rendered it. It would not be efficient for arbitral tribunals to grant preclusive effects to a prior judgment that can still be altered by the court that rendered it¹⁰⁰². Arbitral tribunals should wait until the judgment can no longer be modified by that court so as to avoid the rendering of inconsistent decisions. For the same reason, if appeal proceedings have been brought against the prior judgment, it may be advisable for an arbitral tribunal to await the outcome of the appeal, even if, according to the law of the judgment's country of origin, appeal proceedings have no impact on the judgment's *res judicata* status.

1.1.4. A judicial tribunal with jurisdiction over the parties and the subject matter?

649. The question arises whether a prior judgment should only operate as a *res judicata* in arbitration proceedings if it was rendered by a court with jurisdiction over the parties and the subject matter¹⁰⁰³. If so, the next question is in accordance with which law the court's jurisdiction must be verified.

650. Arbitral tribunals usually must exercise their jurisdiction if there is an interest to do so. *A priori*, this is the case every time the arbitral tribunal has jurisdiction. Hence, rather than verifying the jurisdiction of the prior national court, the arbitral tribunal

the German courts themselves would not regard as conclusive. It is quite true that estoppel is a matter for the *lex fori*, but the *lex fori* ought to be developed in a manner consistent with good sense".

¹⁰⁰¹ See BARNETT, paras 2.35 *et seq.*, in particular para. 2.41.

¹⁰⁰² In this sense, see also SCHLOSSER, *Conflits entre jugement judiciaire et arbitrage*, pp. 391 *et seq.*

¹⁰⁰³ The laws of some countries, *e.g.* England and US, require that the prior judgment be rendered by a court or tribunal having jurisdiction over the parties and the subject matter. In other countries, *e.g.* France and Switzerland, a decision may operate as a *res judicata* even if it was rendered by a tribunal lacking jurisdiction (see *supra*, paras 126 and 164).

must determine its own jurisdiction.

651. In the rare situation where the prior judgment was rendered on precisely the same facts and cause of action and between the same parties, the question whether the prior court had jurisdiction over the dispute ends here. If the arbitral tribunal decides that it has jurisdiction, then by the same token it also decided that the national court did not have jurisdiction.

652. The question is more difficult where a prior judgment was rendered between the same parties, and where the dispute now before the arbitral tribunal overlaps only to a certain degree with what has already been decided in the judgment. In this situation, the jurisdiction of the arbitral tribunal does not exclude the jurisdiction of the state court.

653. Where the prior judgment was rendered in the same country as the arbitral seat, it should be for the law of that country to determine whether the jurisdiction of the prior court is a constituent element of a *res judicata* and, if so, whether the court that rendered the first judgment had jurisdiction to do so.

654. Where the prior judgment was rendered outside the country of the arbitral seat, it may suffice to verify the international jurisdiction of the prior court according to the private international law rules of the arbitral seat, without particular regard to the law of the country where the judgment was rendered. The reason is that where the prior judgment is foreign, the criteria to verify the *res judicata* status of a foreign judgment often correspond to the criteria that must be met for the recognition of a foreign judgment¹⁰⁰⁴. The court's judgment will usually be recognised (and hence qualify as a *res judicata*) at the arbitral seat if the court had jurisdiction in the international sense. Whether the foreign court also had jurisdiction according to its local law is usually not regarded as material in the country of the arbitral seat.

1.1.5. A decision “on the merits”

655. As was seen in Chapter Three of this research, *res judicata* issues may arise with

¹⁰⁰⁴ This is the case, for example, in England. See BARNETT, paras 2.01 *et seq.*

respect to (i) prior judgments in an identical case involving the same dispute between the same parties; (ii) prior judgements in a different case, involving the same parties and an identical issue; (iii) prior judgments on jurisdiction; and (iv) prior judgments on interim measures. The question arises which of these judgments should be able to operate as a *res judicata* in subsequent arbitration proceedings, *i.e.* which of these judgments should be considered as “on the merits” for *res judicata* purposes.

1.1.5.1. Prior judgments in an identical case

656. A prior judgment that finally disposes of the merits of the dispute in an identical case should undoubtedly be considered as “on the merits” for *res judicata* purposes and, thus, should in principle be able to operate as a *res judicata* in arbitration proceedings. While this situation should be rare in practice, it may occur where the jurisdiction of the prior court is contested¹⁰⁰⁵.

657. Where the *res judicata* effect of a prior judgment in the same case is invoked, the arbitral tribunal should commence by examining its own jurisdiction over the dispute. If the arbitrators conclude that they have jurisdiction, they must then decide whether to exercise their jurisdiction. The central question in this situation is whether the arbitral tribunal is bound by the prior court’s explicit or implicit ruling on the validity of the arbitration agreement. This question will be discussed below¹⁰⁰⁶.

658. At this stage it may be noted that even though the arbitrators consider to have jurisdiction over the dispute, where the court that rendered the prior judgment was located in the country of the arbitral seat, the arbitrators should think twice before reconsidering the dispute if all the traditional *res judicata* requirements are met, *i.e.* if the prior judgment is considered a valid *res judicata* according to the local law and if the identity test is met¹⁰⁰⁷. Any award rendered in this situation will risk being set aside. In these circumstances, reconsidering the dispute may well be a waste; the arbitral tribunal should not rely on the fact that the award may still be enforced elsewhere, as most countries will refuse to enforce an award that was annulled at the place of arbitration.

¹⁰⁰⁵ See *supra*, paras 308 *et seq.*

¹⁰⁰⁶ See *infra*, paras 664 *et seq.*

¹⁰⁰⁷ See *infra*, paras 706 *et seq.*

659. The same applies where the prior judgment was rendered in a different country if it was recognised at the arbitral seat. If the prior judgment has not yet been recognised and if the arbitral tribunal decides that it has jurisdiction and the parties have not waived their right to arbitration, then the arbitral tribunal may predict that the prior judgment cannot be recognised at the arbitral seat. In this case, the judgment should not prevent the arbitral tribunal from reconsidering the dispute. Nonetheless, the arbitral tribunal should still give due consideration to the prior judgment so as to avoid contradictions.

660. The above is less based on strict *res judicata* principles, but rather on considerations of coherence and efficiency. If arbitral tribunals are organs of the arbitral legal order, they are not - strictly speaking - under an obligation to give *res judicata* effects to a prior judgment. If the arbitrators consider that they have jurisdiction over the dispute and that it would be appropriate for them to exercise this jurisdiction, then they should have the authority to reconsider the dispute, always giving due consideration to the determinations of the prior court. While in most cases the arbitrators will probably refuse to reconsider the case in the face of a prior judgment rendered or recognised at the arbitral seat, in some situations the arbitrators may proceed to determine the dispute, for example where the arbitrators find the arbitration agreement to be valid and the prior judgment constitutes an unjustified or indeed unlawful attempt to take the dispute out of the hands of the arbitrators.

661. Because the parties generally bear the burden of multiple arbitration proceedings, they should in principle be allowed to waive the *res judicata* effects of a judgment and request the arbitral tribunal to reconsider the same dispute¹⁰⁰⁸. However, the arbitral tribunal should verify that the parties have the right to waive the application of *res judicata* rules under the law governing the arbitration to avoid possible annulment proceedings against the award. This would be important where it is disputed whether the parties have waived the *res judicata* effects of a prior judgment rendered or recognised at the arbitral seat and one of them urges the arbitral tribunal to reconsider the dispute. If all parties request the arbitral tribunal to re-arbitrate the case, they should

¹⁰⁰⁸ See *supra*, paras 596 *et seq.*

normally bear the risk that the award will not be recognised or enforced in a country where the prior (contradictory) judgment was rendered or recognised.

1.1.5.2. *Prior judgment in a different case*

662. A prior judgement that finally disposes of the merits of a dispute in a case that overlaps to a certain degree with the one before the arbitrators should in principle also be considered as “on the merits” and be capable of operating as a *res judicata* in subsequent arbitration proceedings. As before, the arbitral tribunal should begin by determining the existence and scope of its own jurisdiction. If the arbitrators conclude that they have jurisdiction, they must decide whether and to what extent they should exercise their jurisdiction. They must determine to what extent the prior judgment may preclude the reconsideration of the case.

663. This question depends largely on the question of the scope of *res judicata* effects that arbitral tribunals should afford to judgments, namely whether a judgment should have positive *res judicata* effects or give rise to issue estoppel or abuse of process. This question will be examined in further detail below¹⁰⁰⁹.

1.1.5.3. *Prior judgments on jurisdiction*

664. Should a prior judgment on jurisdiction be capable of operating as a *res judicata* in a subsequent arbitration? This question arises only where a national court has held, “on the merits” and not merely on a *prima facie* basis, that there either is a valid arbitration agreement or that there is no such agreement¹⁰¹⁰. This may be the case, for example, where a national court accepts jurisdiction over a dispute on the basis that the arbitration agreement is not valid or inoperative. Similarly, the question may arise in case of a prior court’s declaratory judgment as to the existence or validity of the

¹⁰⁰⁹ See *infra*, paras 688 *et seq.*

¹⁰¹⁰ BORN, p. 2921. No *res judicata* issue arises where a national court, based on a *prima facie* analysis, has held that there appears to be a valid arbitration agreement. Likewise, no *res judicata* issue arises where a national court has stayed litigation as a matter of discretion, without rendering a decision on the validity of the arbitration agreement, or where a national court has held on the merits that there is a valid agreement to arbitrate the question of jurisdiction, leaving such jurisdictional decisions to the arbitrators. In all of these cases, the national court would have rendered an interlocutory procedural ruling, leaving the final resolution of the jurisdictional question to the arbitrators. Hence, these national court decisions cannot operate as a *res judicata* in the arbitration (BORN, p. 2920).

arbitration agreement. In these cases, the question is whether the *res judicata* effect of a prior judgment on jurisdiction bars the arbitral tribunal from examining its own jurisdiction.

665. This question is controversial¹⁰¹¹. It is delicate as there are serious arguments both in favour and against granting preclusive effects to a prior judgment on jurisdiction¹⁰¹².

666. It may be argued that a prior judgment on jurisdiction should be entitled to *res judicata* effects in subsequent arbitration proceedings, because the arbitral tribunal's decision on its own jurisdiction is subject to the control by the supervisory courts at the arbitral seat. A state court has the same power to rule on its jurisdiction, and hence examine the validity of the arbitration agreement, as the arbitral tribunal. There is no reason to presume that the prior court would not accurately assess the validity of the arbitration agreement in dispute. There also is no reason to force a party who does not consider itself bound by an arbitration agreement to first go before an arbitral tribunal to request a declaration as to the validity (or lack thereof) of the arbitration agreement and then commence proceedings before the competent state court. According to this line of argumentation, the arbitral tribunal should give *res judicata* effects to the prior decision on jurisdiction if not doing so could lead to the annulment of the arbitral tribunal's award by the supervisory courts of the arbitral seat.

¹⁰¹¹ SHEPPARD, *The Scope and Res Judicata Effect of Arbitral Awards*, pp. 278 *et seq.* In Switzerland, Perret has argued that an arbitral tribunal is not bound by a prior judgment where the court accepts jurisdiction over the dispute after holding that the arbitration agreement is null and void (see PERRET, pp. 68 and 77). According to others, if the judgment on jurisdiction was rendered in the country of the arbitral seat, the arbitral tribunal is bound by the judgment (POUDRET, p. 159; LALIVE/POUDRET/REYMOND, *Le droit de l'arbitrage interne et international en Suisse*, 1989, pp. 286 *et seq.* See also BUCHER, p. 176). According to Bucher, if the judgment was rendered in a different country, the arbitral tribunal should examine its own jurisdiction. If it finds that it has jurisdiction according to the law governing the arbitration, it should proceed on the merits of the dispute. It is not bound by a prior judgment rendered by a court lacking international jurisdiction as its *res judicata* effects will not be recognised in Switzerland (BUCHER, p. 191). On the position of the Federal Tribunal see DTF 124 III 83 and KAUFMANN-KOHLER/RIGOZZI, paras 449a *et seq.* In England a prior judgment in which a court accepts jurisdiction after declaring the arbitration agreement null and void should be binding in a subsequent arbitration. The court's decision regarding the validity of the arbitration agreement is final and gives rise to issue estoppel in the arbitration (BORN, pp. 2921 *et seq.*; *Republic of Kazakhstan v Istil Group Inc* [2006] EWHC 448 (Comm), [2006] 2 Lloyd's Rep. 370; [2007] EWHC 2729 (Comm); [2008] 1 Lloyd's Report 382 (QB)(see *supra*, fn 548)).

¹⁰¹² See BORN, pp. 2921 *et seq.*

667. By contrast, it has been argued by Born that no preclusive effects should be given to prior judgments on jurisdiction, regardless of whether the judgment was rendered in the country of the arbitral seat or elsewhere¹⁰¹³. This is justified by the arbitral tribunal's autonomy from the courts of the arbitral seat¹⁰¹⁴. Judgments which annul an award are not necessarily binding on the arbitral tribunal or the courts of other countries, which may recognise and enforce annulled awards. If the arbitral tribunal is not bound by the decisions of the annulment court, it is also not bound by the judgments on jurisdiction of the courts of the arbitral seat. If a valid arbitration agreement exists pursuant to the New York Convention, then a judgment on jurisdiction to the contrary would not only be wrong but also an improper intrusion into matters reserved by the arbitration agreement for determination by the arbitral tribunal. A judgment rendered in violation of the New York Convention should not be entitled to have *res judicata* effects in arbitration proceedings. Born submits that arbitral tribunals should take the prior judgment on jurisdiction into consideration. However, if the arbitrators conclude that the prior judgment is incorrect or denies arbitral jurisdiction on the basis of non-arbitrability or public policy, then the arbitral tribunal may disregard the prior judgment and reach a different conclusion.

668. In our opinion, prior judgments on jurisdiction generally should not be binding on arbitral tribunals so as to protect the arbitration process from unnecessary and unjustified interferences by national courts. It must be shielded against dilatory tactics designed to paralyse or avoid an arbitration that the parties validly agreed upon. A party contesting the jurisdiction of the arbitral tribunal may validly seize the courts of the arbitral seat directly with an action concerning the jurisdiction of the tribunal. The party may also in good faith initiate proceedings on the merits before a national court and obtain a judgment to the effect that the court, rather than the arbitral tribunal, has

¹⁰¹³ See BORN, pp. 2923 *et seq.* Born distinguishes between, on the one hand, judgments regarding the scope of the arbitration agreement, the termination or lapse of the agreement, or the waiver of an admitted right to arbitrate, and, on the other hand, judgments concerning the existence and validity of the agreement. According to Born, both types of jurisdictional judgments should not have any *res judicata* effects in a subsequent arbitration.

¹⁰¹⁴ Born admits that this is controversial. According to Mayer, an arbitral tribunal should be bound by a prior judgment rendered or recognised in the country of the arbitral seat. In this case, the second arbitral tribunal should decline jurisdiction over the dispute to avoid annulment of its award (MAYER, *Litispence, connexité et chose jugée dans l'arbitrage international*, p. 202).

jurisdiction over the dispute. However, a prospective respondent in arbitration may attempt to gain an undue advantage by bringing the dispute before its own courts despite the existence of an arbitration agreement. The respondent may also obtain an anti-arbitration injunction on the grounds that the arbitration agreement is not valid. This “vexing problem” was pertinently described by Paulsson:

“The subversion of an arbitration agreement is a grave matter. Instead of a neutral forum, the victim suddenly finds itself confronted by a jurisdiction which will judge its conduct according to a very different yardstick. Without even mentioning the unmentionable (corruption and xenophobia), everything is suddenly stacked in favour of the other side: language, procedure, practical convenience, ability to use one’s lawyers, cultural affinities with the decision-maker ... and the list goes on”¹⁰¹⁵.

669. In order to protect international arbitration against such scenarios, it is important to strengthen the arbitral tribunal’s autonomy from national courts. This is achieved by strengthening the arbitral tribunals’ competence-competence. Arbitral tribunals should be free to consider and reach their own conclusions as to their jurisdiction and not be bound by the prior jurisdictional determinations of state courts, whether they are located in the country of the arbitral seat or elsewhere. In most cases this will not pose problems as courts and arbitrators will frequently reach the same conclusion with regard to arbitral jurisdiction, in particular where they are located in the same country¹⁰¹⁶.

670. However, arbitral tribunals cannot act “as if they did not belong to this world”¹⁰¹⁷. While in theory they may decide on their jurisdiction as if the prior judgment on jurisdiction had not been rendered¹⁰¹⁸, in practice they should normally not ignore the prior jurisdictional determinations of national courts, in particular those of the courts at the arbitral seat. Where a court at the arbitral seat finally decided that the arbitral tribunal does not have jurisdiction over the parties and the dispute, “it may be

¹⁰¹⁵ PAULSSON, *Interference by National Courts*, p. 135.

¹⁰¹⁶ BORN, p. 2927.

¹⁰¹⁷ LALIVE, *Transnational (or Truly International) Public Policy*, para. 44.

¹⁰¹⁸ PINNA, para. 6.

pointless, imprudent, or indeed unlawful”¹⁰¹⁹ for the arbitral tribunal to act, absent other serious factors, in contradiction with the ruling, even if the arbitrators believe it to be wrong. This applies especially where the law of the arbitral seat clearly gives the court the authority to rule on the arbitral tribunal’s jurisdiction¹⁰²⁰. If the arbitrators accept their jurisdiction despite the prior contradictory court ruling and proceed on the merits, their award might be set aside.

671. Nevertheless, in certain situations arbitrators should be free to ignore the jurisdictional determinations of the courts at the arbitral seat, namely to fulfill their duty to the parties and ensure that the arbitration agreement is not frustrated. This might be the case where the respondent in the arbitration is the state or state entity of the country of the arbitral seat. If the arbitrators have justifiable reasons to believe that the courts of the arbitral seat were used as an instrumentality of the respondent to avoid the arbitration, they should be entitled to ignore the court’s jurisdictional ruling. In these circumstances, the arbitrators may indeed be justified as a matter of international law to hold that the national courts were not entitled to interfere in the arbitration¹⁰²¹.

672. Where the prior decision was rendered by a national court in a country other than the arbitral seat, the arbitral tribunal should weigh the consequences of accepting its jurisdiction despite the prior judgment denying the arbitrators’ jurisdiction over the dispute. The arbitral tribunal’s award may be refused recognition and enforcement in the country where the prior judgement was rendered. If enforcement may be sought in other jurisdictions, the arbitral tribunal may feel free to accept jurisdiction and proceed on the merits. The arbitrators should also ensure that their refusal to give *res judicata* effects to the foreign judgment on jurisdiction may not impair their award’s efficacy at the place of arbitration.

673. Where the national court and arbitral tribunal are located in different Member

¹⁰¹⁹ PAULSSON, *Interference by National Courts*, p. 125.

¹⁰²⁰ PAULSSON, *Interference by National Courts*, p. 130.

¹⁰²¹ PAULSSON, *Interference by National Courts*, p. 131. For an illustration see, e.g., High Court, Dhaka, *Himpurna California Energy Ltd v Republic of Indonesia*, 5 April 2000, 15 Mealey’s Int. Arb. Rev. (February 2000), pp. A1 *et seq.*; Supreme Court of Pakistan, *HUBCO v WAPDA*, 20 June 2000, *Arbitration International*, Vol. 16, No. 4 (2000), pp. 439 *et seq.*; ICC Case No. 10623, 2001. These cases concern anti-arbitration injunctions. The reasoning may however apply, *mutatis mutandis*, in the *res judicata* context.

States of the EU or EEA, the arbitrators will have to consider whether a prior court's decision holding that there is no valid arbitration agreement is covered by the EC Regulation No. 44/2001 or the Lugano Convention.

674. As the law stands today, due to the arbitration exclusion in Article 1 (2)(d) JR (Article 1 (2)(4) LC), the Regulation excludes not only arbitration proceedings, but also court proceedings relating to arbitration. However, since the ECJ's decision in *Allianz SpA v West Tankers Inc* it is clear that the EC Regulation applies to a Member State's court decision on the merits of a civil or commercial dispute, in which the court accepted its jurisdiction and held preliminarily that there is no valid arbitration agreement¹⁰²².

675. As a result, such decisions must be recognised in all other Member States pursuant to Articles 32 *et seq.* JR. The courts in other Member States normally will not be able to review the prior court's assessment of its jurisdiction¹⁰²³, including the court's assessment of the validity of the arbitration agreement¹⁰²⁴. Courts and arbitral tribunals with seat in another Member State will thus have to decline jurisdiction over the same dispute on the grounds that no valid arbitration agreement exists, even though the arbitration agreement would be valid according to the law of the place of arbitration¹⁰²⁵. This being said, several commentators have argued that a review of the validity of the arbitration agreement by the courts in the recognising country should in any case be

¹⁰²² ECJ, *Allianz SpA et al v West Tankers Inc*, Case C-185/07, 10 February 2009 (“If, because of the subject matter the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application”). See also ECJ, *Marc Rich & Co. AG v Società Italiana Impianti PA*, Case C-190/89, 21 July 1991, 1991 ECR, p. I-3855, para. 28; ECJ, *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another*, Case C-391/95, 17 November 1998, 1998 ECR, p. I-7091, para. 32.

¹⁰²³ Articles 33 (1) and 35 (3) JR and Articles 26 (1) and 28 (4) LC. A list of exceptions is provided in Articles 35 (1) JR and 28 (1) LC.

¹⁰²⁴ KROPHOLLER, p. 101, para. 46; WICKI, p. 312.

¹⁰²⁵ See decision of the English Court of Appeal in *National Navigation Company v. Endesa Generacion SA* [2009] EWCA Civ 1397, para. 59 (“A regulation judgment can however give rise to an issue estoppel as much in Arbitration proceedings excluded from the regulation as in any other proceedings in an English court”). This should not apply where the prior court's judgment violates public policy (Article 34 (1) JR/Article 27 (1) LC).

possible¹⁰²⁶.

676. Arbitral tribunals with seat in a Member State of the EU or EEA should think twice before accepting their jurisdiction where a national court in another Member State has rendered a judgment on the merits, implicitly declaring the arbitration agreement in question to be null, void or inoperative. Because this judgment might well have to be automatically recognised in the country of the arbitral seat, the arbitral tribunal's award will risk being set aside.

1.1.5.4. Prior judgments on interim measures

677. Where a national court has granted or denied a request for interim relief, an arbitral tribunal seised subsequently of the same request has to decide whether the prior court's decision may preclude the arbitrators from reconsidering the request.

678. Interim or provisional measures, as the term suggests, are intended to have provisional effects pending the final resolution of the dispute. These measures are ordinarily not intended to operate as *res judicata* "in the conventional sense"¹⁰²⁷, because they may be revised, reconsidered, modified or revoked where the circumstances have changed or in accordance with new facts¹⁰²⁸.

679. In addition, it is clear that an interim measure cannot act as a *res judicata* with regard to the merits of the case, even if the court that rendered the measure considered

¹⁰²⁶ See, e.g., VAN HOUTTE, p. 90 (VAN HOUTTE invokes a conflict between the Brussels and Lugano Conventions/EC Regulation and the New York Convention. The recognition and enforcement of a judgment rendered in violation of Article II NYC could be considered as a violation of public policy); GAUDEMET-TALLON, para. 363 (According to GAUDEMET-TALLON, a judgment should be considered as falling within the scope of the arbitration exclusion whenever there was a "serious" debate regarding the existence of a valid arbitration agreement and lack of jurisdiction was raised in good faith by the respondent before the court that rendered the judgment. Because in these cases the judgment would not be covered by the EC Regulation/Lugano Convention, the courts in the recognising country would be allowed to review the international jurisdiction of the prior court and, thus, the jurisdiction of the arbitral tribunal. In this sense, see also AUDIT, *Arbitration and the Brussels Convention*, pp. 1 *et seq.*); BESSON, *Le sort et les effets au sein de l'Espace judiciaire européen d'un jugement écartant une exception d'arbitrage et statuant sur le fond*, pp. 343 *et seq.* (According to BESSON, when denying the existence of a valid arbitration agreement, the national court that rendered the prior judgment also decided on the material scope of application of the EC Regulation/Lugano Convention. Because the material applicability of these instruments can be reviewed at the recognition and enforcement stage, the question of the arbitral jurisdiction can also be reconsidered at this moment).

¹⁰²⁷ YEŞİLIRMAK, para. 5-63.

¹⁰²⁸ *Ibid.*

issues relating to the merits, such as the likelihood of success or a good arguable case on the merits. An arbitral tribunal deciding the merits of the dispute will not be bound by any determinations concerning the merits made by a national court in the interim measure. The national court's decision on interim relief is limited in scope to questions regarding a *prima facie* claim, relevant to the requested measure. The arbitral tribunal on the other hand has the exclusive jurisdiction over the merits of the dispute¹⁰²⁹.

680. Nevertheless, it appears to be admitted that interim measures have some temporary *res judicata* effects. The parties are bound by the measure until it is rescinded or modified and the court that rendered the measure cannot reconsider it, unless new facts emerge that change the basis on which it was rendered¹⁰³⁰.

681. As was seen earlier in this research, in ICC Case No. 4126 of 1984 and Order No. 5 of 2 April 2002 the arbitral tribunal had to decide whether a party could seek interim relief in the arbitration despite the fact that an identical or similar request for relief had previously been denied by a state court. In both cases the arbitral tribunal considered the application of *res judicata* rules. In both cases the tribunals refused to grant the request for interim relief¹⁰³¹.

682. In ICC Case No. 4126, after finding that the party identity requirement was not met, the tribunal nevertheless denied the party's request for interim relief based on "the rules of good procedural order"¹⁰³². Because the object of the new request was essentially identical to the object of the prior request and because there was no change in circumstances, the tribunal held that the party to both procedures was bound by the prior court decision denying the interim measure. As was seen above, this decision was endorsed by the ICC tribunal in Order No. 5 of 2 April 2002¹⁰³³.

683. In the circumstances of these cases, the application of preclusion rules appears fully justified to prevent the wasteful and unnecessary reconsideration of the prior court decision. If a national court dismissed a request for interim relief on non-jurisdictional

¹⁰²⁹ BORN, p. 2930.

¹⁰³⁰ See, e.g., French and Swiss law (*supra*, paras 124 and 160).

¹⁰³¹ See *supra*, paras 483 *et seq.*

¹⁰³² See *supra*, paras 448 *et seq.* for a quotation of the relevant passages in the award.

¹⁰³³ See *supra*, paras 454 *et seq.*

grounds, then the court's decision should in principle bind the parties, as well as the arbitral tribunal subsequently seised of an identical request, unless there is a change in circumstances. Likewise, where a party has obtained interim relief in aid of arbitration from a national court, over the objections of the adverse party, there are good reasons to conclude that, absent a change in circumstances, the arbitral tribunal should be bound by the prior court's decision¹⁰³⁴. By contrast, where there was a relevant change in circumstances between the time of the national court decision and the subsequent application to an arbitral tribunal, the prior court's decision on interim relief should only have limited preclusive effects (if any) in the arbitration¹⁰³⁵.

684. It has been argued that prior national court decisions granting interim relief should not have any preclusive effects before an arbitral tribunal seised of the same request. Because of the provisional nature of the measure, the arbitrators can review and alter the measures taken by national courts. Where there is a conflict between the provisional measures, the decision of the arbitral tribunal should prevail¹⁰³⁶. This argumentation applies where a national court was seised of a request for interim relief despite the existence of an arbitration agreement and, with particular force, where the arbitral tribunal was already constituted and where the interim relief requested from the national court is of the same kind as the relief ultimately sought from the arbitrators. Interim measures can often have a decisive impact on the outcome of a dispute. Thus, there is a risk that a court ordered interim measure will take the dispute out of the hands of the arbitrators. To prevent this, the arbitral tribunal, who has the exclusive jurisdiction over the merits of the dispute, should be able to alter an interim measure previously granted by a national court if it considers this to be appropriate. In addition, the arbitral tribunal may have a much more complete factual and legal record of the case and may thus be best suited to decide the request for interim measures.

685. On the other hand, it has been argued that arbitral tribunals should adopt a *sui generis* analysis of preclusion issues in the context of interim measures. Where a party's request for interim relief was denied by a national court, it should not be allowed to

¹⁰³⁴ BORN, p. 2931. Born notes that where interim relief was granted on an *ex parte* basis, there should obviously be no preclusive effects from the resulting *ex parte* decision.

¹⁰³⁵ BORN, pp. 2930 *et seq.*

¹⁰³⁶ FOUCHARD/GAILLARD/GOLDMAN, para. 1330.

renew its request before an arbitral tribunal. By contrast, the party that did not initiate the request for interim measures before the national court should be allowed to apply to the arbitral tribunal to withdraw or revise a measure previously granted by the court¹⁰³⁷.

686. It is contended that arbitral tribunals should adopt this *sui generis* approach. A party that was previously denied interim relief before a national court should not have a second bite at the same cherry before the arbitrators. Where the court proceedings respected fundamental principles of due process, the losing party generally has no sufficient interest to repeat, against the will of the adverse party, proceedings which the parties already went through. Thus, in this situation the arbitral tribunal should give preclusive effects to the prior court decision. As was seen above, this approach is already followed by arbitral tribunals.

687. It is also justified to allow the party that did not request the interim relief from a national court to apply to the arbitral tribunal to alter a measure granted by the court. While the arbitrators should always give due considerations to the court's decision, they should have the authority to review the measure if they consider this appropriate. This respects the arbitral tribunal's primacy as the parties' chosen mechanism for the resolution of their dispute. It is also important to protect the arbitral tribunal's jurisdiction over the merits of the dispute.

1.2. The Scope of *Res Judicata* Effects to be Afforded to Prior Judgments in Arbitration Proceedings

688. Having determined the type of decisions that may operate as a *res judicata* in arbitration proceedings, it is now necessary to investigate to what extent these decisions should be afforded *res judicata* effects. Should these *res judicata* effects be limited to claim preclusive effects as in civil law countries or also cover issue preclusive effects and abuse of process as in common law countries?

689. The extent of preclusive effects to be given to a judgment should be determined by the policies underlying the *res judicata* doctrine, taking into consideration the nature and objectives of international arbitration, as well as the legitimate expectations of the

¹⁰³⁷ BORN, pp. 2932 *et seq.*

parties. *A priori*, there appears to be no reason why a judgment should not in principle be capable of having issue preclusive effects in a subsequent arbitration. Likewise, it should *a priori* depend on the discretion of the arbitral tribunals whether to give a judgment preclusive effects with regard to matters that were not, but could and should have been, raised in prior court proceedings.

690. It was seen above that the question of claim preclusion arises most often where a prior judgment was rendered on the merits in a case involving a different claim than the one before the arbitral tribunal. The national court may have rendered a judgment on question X. Question X may then arise again before the arbitrators seized of question Y. The question is whether the arbitrators are bound by the court's judgment on X.

691. The arbitral tribunal seized of question Y should be bound by the prior judgment on question X. The arbitral tribunal normally would have jurisdiction to decide question X as this preliminary issue is necessary for the resolution of question Y. However, because question X was the main issue and not merely a preliminary issue in the prior court proceedings, the national court had a stronger interest in deciding X. The arbitral tribunal therefore should not reconsider, but should implement the court's judgment¹⁰³⁸.

692. Within the context of arbitral tribunals facing prior arbitral awards, the final ILA report on arbitration and *res judicata* endorses a broad notion of claim preclusion under which *res judicata* not only is to be read from the dispositive part of the decision but also from its underlying reasoning. If it is clear from a prior arbitral tribunal's reasoning that the dispositive part is to be interpreted in a way to bar further or subsequent arbitration proceedings, claim preclusion ought to follow for the sake of arbitral efficiency and finality. Giving *res judicata* effects to the prior award as well as its underlying reasoning would prevent that some evidence or legal argument regarding that cause of action will be reargued¹⁰³⁹.

¹⁰³⁸ MAYER, *Litispence, connexité et chose jugée dans l'arbitrage international*, p. 198.

¹⁰³⁹ ILA, *Final Report*, para. 52.

693. It would be possible in principle for arbitral tribunals to grant preclusive effects to reasons necessarily underlying prior judgments. Even though this solution may not be well grounded in transnational law, it should be acceptable for reasons of procedural efficiency and finality¹⁰⁴⁰. However, due to the lack of interchangeability between arbitral tribunals and national courts, it does not seem appropriate in international arbitration to give *res judicata* effects to reasons underlying prior court judgments¹⁰⁴¹. However, arbitrators may always consider reasons to interpret the meaning and scope of the judgment¹⁰⁴².

694. Unless the parties agree otherwise, arbitral tribunals generally should not be bound by the reasons underlying a prior judgment. An arbitral tribunal seised of a dispute should be able to reach its own conclusions based on the parties' submissions, without being bound by the determinations of particular issues contained in the reasoning of a prior judgment rendered in a different case between the same parties. An arbitral tribunal must be able to decide the dispute before it for its own reasons and based on its own opinions.

695. No preclusive effects should be given to reasons where an arbitral tribunal is seised of question Y and this same question was already necessarily decided as a preliminary issue in the reasoning of a court judgment between the same parties involving question X. Because the prior court decided the question as a preliminary issue, it did not have a greater interest than the arbitrators in deciding the question. To the contrary, the arbitral tribunal has exclusive jurisdiction to decide question Y and thus has a greater interest than the national court to determine the issue. Therefore, the arbitral tribunal should not be bound by the prior court's decision on a preliminary issue where the same issue arises as the main issue before the arbitrators.

696. As explained by Mayer, the same applies, albeit with less force, where an arbitral tribunal seised of a dispute has to decide the preliminary issue X, and issue X was already necessarily determined as a preliminary issue in the reasoning of a prior

¹⁰⁴⁰ In this sense (with regard to issue estoppel), see ILA, *Final Report*, para. 56.

¹⁰⁴¹ See MAYER, *Litispence, connexité et chose jugée dans l'arbitrage international*, pp. 197 *et seq.*

¹⁰⁴² According to HÉRON, considering reasons to interpret and clarify a decision's dispositif essentially has as a result to afford these reasons *res judicata* effects (para. 4).

judgment in a different case between the same parties¹⁰⁴³. Because the prior court decided issue X as a preliminary issue, it did not have a greater interest than the arbitrators in deciding the question; the national court and the arbitral tribunal have the same interest to determine the particular preliminary issue.

697. These two situations are not situations of claim preclusion, but of issue preclusion. Hence, it is suggested that the doctrine of issue preclusion should not apply before international arbitral tribunals. Adopting the issue preclusion doctrine would undoubtedly be useful for reasons of procedural efficiency and the avoidance of contradictory decisions. However, because the arbitral tribunal's interest in reaching its own conclusions on the particular issue before it is at least as great as the national court's interest, it is contended that issue preclusion should not apply. As was seen above, a reason behind the civil law approach against issue preclusion is that the importance of a legal action and a specific issue figuring in that action could differ widely in relation to another legal action¹⁰⁴⁴. This reasoning seems to apply with even greater force in the relations between court and arbitration proceedings due to the lack of interchangeability between arbitral tribunals and state courts. Not granting issue preclusive effects to prior court judgments in subsequent arbitration proceedings seems to better respect the parties' intention to submit a particular dispute to arbitration.

698. In order to avoid contradictory decisions on preliminary issues, arbitral tribunals should be guided by principles of procedural efficiency and good faith and give due consideration to the determinations of the national court. The concern to make arbitration proceedings faster and cheaper should allow arbitrators to adopt the prior preliminary rulings of a court¹⁰⁴⁵. However, if the arbitrators disagree with the national court's preliminary findings, they should be able to depart from them so as to decide the dispute for their own reasons and based on their own opinions. This means that arbitral tribunals should have the authority to depart from earlier national court rulings on particular (preliminary) issues or to adopt them where this is considered appropriate. The parties may expressly agree on the application of issue preclusion principles. The

¹⁰⁴³ MAYER, *Litispence, connexité et chose jugée dans l'arbitrage international*, p. 198.

¹⁰⁴⁴ See *supra*, para. 181.

¹⁰⁴⁵ As was seen *supra* (para. 497), the 2006 PWC/SIA survey has shown that procedural efficiency is an important concern of international arbitration users.

arbitrators may also consider it appropriate to adopt prior court rulings on specific issues where the parties are from common law jurisdictions and legitimately expect the application of issue preclusion principles and where the traditional requirements for the application of the issue preclusion doctrine are met¹⁰⁴⁶. Conversely, the arbitrators may not do so where the parties are from civil law jurisdictions and unfamiliar with the concept of issue preclusion.

699. In addition, it may be premature to impose the application of issue preclusion principles on arbitral tribunals. Even if this doctrine might be acceptable worldwide for reasons of procedural efficiency and finality, it remains that at present it is not recognised in civil law jurisdictions. The ALI/UNIDROIT Principle on Transnational Civil Procedure generally exclude the issue preclusion doctrine. Issue preclusion may be invoked only in exceptional cases when the re-litigation of certain factual or legal issues would be clearly abusive¹⁰⁴⁷.

700. Finally, the question arises whether arbitral tribunals should apply the abuse of process doctrine. The approach suggested in the final IIA report appears appropriate also where the plea of abuse of process is based on prior court proceedings. According to Recommendation No. 5,

“[a]n arbitral award has preclusive effects in the further arbitral proceedings as to a claim, cause of action or issue of fact or law, which could have been raised, but was not, in the proceedings resulting in that award, provided that the raising of any such new claim, cause of action or new issue of fact or law amounts to procedural unfairness or abuse.”

701. When deciding whether a party should be barred from raising a claim, cause of action or issue in the arbitration on the grounds that the party should have raised it in the court proceedings, arbitral tribunals must balance the private and public interests at stake. A claimant may have justifiable reasons for not raising certain issues in the court proceedings. The claimant has a corresponding right to have access to justice with regard to such issues not already determined in prior proceedings. By contrast, the

¹⁰⁴⁶ IIA, *Final Report*, para. 56.

¹⁰⁴⁷ See *supra*, paras 231 *et seq.*

respondent has a right to a fair trial. It has a legitimate interest to be protected against further proceedings where the claimant failed to raise certain issues in prior proceedings. There also is a public interest in not having arbitration proceedings in such circumstances so as to avoid additional proceedings before the supervisory courts at the arbitral seat¹⁰⁴⁸.

702. The arbitrators should have the authority to decide whether to apply the abuse of process doctrine or not. The party pleading abuse of process will have to persuade the arbitrators that the new arbitration proceedings constitute an abuse of process and a procedural unfairness. The arbitrators must be convinced that it would be just to deny the adverse party the opportunity (or right) to raise a matter that has not been determined in a prior decision, because this matter could and should in good faith have been brought in the prior proceedings.

1.3. Requirements for the Application of the *Res Judicata* Doctrine

703. The final ILA Report on *res judicata* and arbitration identified five cumulative requirements for the application of the *res judicata* doctrine between arbitral tribunals:

- “- The prior award must be final and binding and capable of recognition in the country where the arbitral tribunal of the subsequent arbitration proceedings has its seat
- The arbitration proceedings in which the *res judicata* issue is raised, must pertain to the same legal order as the prior award
- Identity of the subject matter
- Identity of the cause of action
- Identity of the parties¹⁰⁴⁹.

704. These are the traditional *res judicata* requirements transposed from litigation to arbitration. The application of these requirements seems generally appropriate. Because the aim of the *res judicata* doctrine is essentially the same whether the prior decision is a

¹⁰⁴⁸ See ILA, *Final Report*, paras 60 *et seq.*

¹⁰⁴⁹ ILA, *Final Report*, para. 29.

judgment or an award there appear to be no good reasons for applying different *res judicata* requirements. Accordingly, the requirements listed above should apply *mutadis mutandis* where arbitral tribunals have to determine the *res judicata* effects of a prior judgment.

705. The following analysis will begin by examining the triple identity test (**1.3.1.**). It will then investigate whether a prior judgment must be capable of recognition at the arbitral seat in order to operate as a *res judicata* in the arbitration proceedings (**1.3.2.**). The requirement of the same legal order was already discussed in chapter five¹⁰⁵⁰.

1.3.1. The triple identity test

706. With regard to the triple identity test, ILA's Recommendation No. 3 provides that a prior award should have *res judicata* effects in subsequent arbitration proceedings if

“[...]”

3.2 it has decided on or disposed of a claim for relief which is sought or is being reargued in further arbitration proceedings;

3.3 it is based upon a cause of action which is invoked in further arbitration proceedings; and

3.4 it has been rendered between the same parties”.

707. There appear to be no reasons why this triple identity test should not apply where an arbitral tribunal has to determine the *res judicata* effects of a prior judgment. The triple identity test ensures the identicalness of the disputes in both proceedings. It thereby avoids that a party is deprived of its right of access to justice with regard to a matter that was not already decided in prior proceedings. In other words, it avoids the denial of justice. By the same token, it also avoids unnecessary and wasteful duplications of proceedings: it is redundant to adjudicate the same dispute in more than one set of proceedings and it is undesirable that parties to a single dispute, through their

¹⁰⁵⁰ See *supra*, paras 583 *et seq.*

own conduct, would generate inconsistent decisions regarding their rights and duties¹⁰⁵¹. These underlying rationales are the same whether the prior decision is a judgment or an award.

708. The triple identity test applies only in case of claim preclusion. It does not apply in case of issue preclusion which traditionally applies not only regarding the same claim, but also regarding different claims¹⁰⁵². Likewise, it does not apply in case of abuse of process which, by definition, involves a claim, cause of action or issue that was not raised in the prior proceedings.

709. Transnational law should define the test to assess the identity between a prior and a subsequent dispute. This will not be an easy task due to the uncertainties in both national and international law as to the interpretation to be given to the notions of “parties”, “cause” and “object”. Arbitral tribunals should attempt to determine the dominant tendency among national laws, with particular regard to those national laws most closely connected to the parties and the dispute¹⁰⁵³. Useful inspiration could also be sought in public international law which developed a triple identity test based on domestic *res judicata* rules¹⁰⁵⁴. Likewise, the ECJ has interpreted the triple identity test in several cases pertaining to *lis pendens*¹⁰⁵⁵.

710. Due to the uncertainty of existing law on the matter, we will refrain from formulating new transnational definitions of the notions of “parties”, “cause” and “object”. However, it is useful to comment on the scope to be given to these notions.

711. There are important arguments in favour of a broad interpretation of the triple identity test. A strict application of the test can put form over substance and ignore the “underlying economic realities”¹⁰⁵⁶. Citing as an example the *Lauder/CME* cases, Shany observed

¹⁰⁵¹ SHANY, *Similarity in the Eye of the Beholder*, pp. 126 *et seq.*

¹⁰⁵² MAYER, *Litispence, connexité et chose jugée dans l'arbitrage international*, p. 197; ILA, *Final Report*, para. 57. See also *supra*, paras 54 *et seq.* and 95 *et seq.*

¹⁰⁵³ See *supra*, para. 571.

¹⁰⁵⁴ See *supra*, paras 272 *et seq.*

¹⁰⁵⁵ See *supra*, paras 205 *et seq.* International arbitrators should however be careful when applying a triple identity test designed for *lis pendens*. Because the consequences of *lis pendens* are less drastic than those of *res judicata*, the test may be interpreted more broadly in a *lis pendens* situation.

¹⁰⁵⁶ SCHREUER/REINISCH, *The Partial Award of September 13, 2001*, para. 223.

“a wider trend to erode or circumvent the application of jurisdiction-regulating rules [such as the *res judicata* doctrine] through emphasizing the differences existing between related claims in a way that puts into question the very need for their regulation”¹⁰⁵⁷.

712. Accordingly, a strict interpretation of the identity test may lead to abuse by parties trying to get a second bite at the cherry. Likewise, it may be contrary to strong public policy grounds underlying the *res judicata* doctrine, such as the avoidance of wasteful duplications of proceedings leading to inconsistent decisions¹⁰⁵⁸. If arbitral tribunals were to adopt a strict approach with regard to the identity test, the *res judicata* doctrine would rarely apply¹⁰⁵⁹. Indeed, multiple proceedings in international arbitration rarely involve exactly the same parties and issues¹⁰⁶⁰. Economic disputes may often be highly complex, involving closely related economic entities and separate yet essentially identical instruments¹⁰⁶¹. In this context, a strict application of the identity test could lead to injustice in international arbitration where there are limited possibilities to avoid parallel proceedings¹⁰⁶². To avoid such injustice it has been argued that arbitral tribunals must look at the underlying nature of a dispute and not at its formal classification. Although a dispute may not appear to be literally identical to a dispute previously decided, it may be substantially identical¹⁰⁶³.

713. Conversely, a broad interpretation of the identity test could violate a party's right of access to justice, which is both a human right and a general principle of justice. If the parties and questions at issue in both proceedings are not identical, then each party has the right to bring separate proceedings¹⁰⁶⁴. Where the prior decision was a judgment, it may be argued that a broad interpretation of the identity test could deprive

¹⁰⁵⁷ SHANY, *Similarity in the Eye of the Beholder*, p. 122.

¹⁰⁵⁸ SHEPPARD, *The Scope and Res Judicata Effect of Arbitral Awards*, p. 282.

¹⁰⁵⁹ SCHREUER/REINISCH, *The Partial Award of September 13, 2001*, para. 265. See also SHEPPARD, *The Scope and Res Judicata Effect of Arbitral Awards*, p. 278 (“[...] there are relatively few cases where *res judicata* has been applied. Very often, the tribunal has found that the triple identity test has not been met”).

¹⁰⁶⁰ HOBÉR, p. 245.

¹⁰⁶¹ SHANY, *Similarity in the Eye of the Beholder*, pp. 130 *et seq.*; BREKOULAKIS, p. 189.

¹⁰⁶² SHEPPARD, *The Scope and Res Judicata Effect of Arbitral Awards*, p. 282. See also *supra*, para. 509.

¹⁰⁶³ SCHREUER/REINISCH, *The Partial Award of September 13, 2001*, paras 273 *et seq.* See also BUCHER who favours an “*identité fonctionnelle*” as opposed to a “*identité formelle*” of claims (in the context of *lis pendens* in international litigation)(*L'examen de la compétence internationale*, p. 168).

¹⁰⁶⁴ HASCHER, p. 26; SHANY, *Similarity in the Eye of the Beholder*, pp. 125 and 127.

a party of its right to arbitrate a certain dispute or issue¹⁰⁶⁵. The lack of interchangeability between arbitral tribunals and national courts thus militates for a narrow interpretation of the identity test. Where there is the slightest interest for the arbitral tribunal to exercise its jurisdiction over the dispute, namely because the parties and the dispute in the prior court proceedings were not the same, it should not refuse to do so based on *res judicata*. In addition, because the application of the *res judicata* doctrine has serious consequences, *i.e.* the denial by the arbitral tribunal to exercise its jurisdiction, it appears justified to apply this doctrine only where a strict identity test is met.

714. Arbitral tribunals ultimately face a policy choice. They can either apply a strict identity test to protect and give maximum effectiveness to the arbitration agreement, or they can apply a broad identity test to further policy considerations such as procedural efficiency and legal coherence. A strict application of the identity test might have the benefit of clarity, predictability and ease of application¹⁰⁶⁶. By contrast, a broader, more flexible identity test might allow arbitral tribunals to fully address the complexity of the legal situation and engage in pragmatic problem solving. A flexible identity test would afford a higher degree of discretionary power to arbitral tribunals and, thus, reduce legal certainty and predictability¹⁰⁶⁷.

715. For the reasons given above, a narrow identity test appears justified. However, an arbitral tribunal's mandate is limited. Arbitrators should be wary of resolving aspects of a dispute that they were not authorized to resolve. By adopting a too narrow identity test and thereby interpreting the scope of their jurisdiction too broadly, arbitral tribunals might exceed their mandate¹⁰⁶⁸. Likewise, arbitrators should be careful not to adopt an overly formalistic approach to avoid parties from unduly evading the application of the *res judicata* doctrine. Overreliance on formal criteria may open the

¹⁰⁶⁵ Where the first decision is an award, this consideration seems less important, because the party will not be denied the opportunity to arbitrate. The argument may be invoked nonetheless, because arbitral tribunals cannot be considered as interchangeable between each other (see *supra*, paras 589 *et seq.*).

¹⁰⁶⁶ SHANY, *Similarity in the Eye of the Beholder*, p. 129; SHEPPARD, *The Scope and Res Judicata Effect of Arbitral Awards*, p. 282.

¹⁰⁶⁷ SHANY, *Similarity in the Eye of the Beholder*, p. 129.

¹⁰⁶⁸ SHANY, *Similarity in the Eye of the Beholder*, p. 134.

doors to abuse through deliberate recourse to multiple proceedings¹⁰⁶⁹. Such abuse is particularly feasible in international arbitration where arbitrators frequently face highly complex disputes involving multiple and closely related parties, contracts and issues.

716. In order to avoid such abuse, arbitral tribunals could be guided by the abuse of rights (*abus de droit*) principle, which is recognized as a general principle of law¹⁰⁷⁰. In exceptional circumstances, this principle could bar parties from unduly invoking the right to bring a new claim when a virtually identical claim has already been adjudicated in prior proceedings. It might also give arbitral tribunals the authority to prevent parties from raising in the arbitration certain claims of relief that they could and should have brought in the prior litigation. The final ILA Report appears to support the application of the *abus de droit* principle in this context, referring to it as the abuse of process and procedural unfairness doctrine¹⁰⁷¹. According to ILA, this doctrine applies with regard to the identity of cause of action requirement¹⁰⁷². In certain situations the arbitrators may conclude as to an abuse of process or procedural unfairness if a party attempts to modify the cause of action by raising a different ground in support of the same claim for relief. Arbitrators should examine whether the different provisions relied upon in support of the claim are substantially identical or different. If the provisions contain substantially the same rule, the arbitrators may conclude as to the identity of the cause of action¹⁰⁷³.

717. The abuse of process and procedural unfairness doctrine should also apply with regard to the party identity requirement. A party to an arbitration should not be able to

¹⁰⁶⁹ SHANY, *Similarity in the Eye of the Beholder*, p. 130.

¹⁰⁷⁰ SHANY, *Similarity in the Eye of the Beholder*, p. 124; CHENG, p. 121.

¹⁰⁷¹ ILA, *Final Report*, para. 42.

¹⁰⁷² ILA, *Final Report*, para. 43.

¹⁰⁷³ It has been suggested that arbitral tribunals may consider a dispute identical to a dispute previously decided where the same claim is based on the same factual background (in this sense see SCHREUER/REINISCH, *The Partial Award of September 13, 2001*, para. 257). This appears to be in line with recent developments in civil law countries where courts now adopt a broader and more pragmatic approach to assess the identity of questions in dispute. This new approach aligns these civil law countries with the pragmatic approach followed in common law countries, as well as the broad approach adopted by the ECJ when interpreting the identity of “cause of action” requirement under EC Regulation No. 44/2001 (see *supra*, paras 208 *et seq.*). It also mirrors the tendency of international courts and tribunals to focus on the facts underlying the claims in order to determine whether two disputes are identical or not (See *supra*, para. 294). Accordingly, it could be appropriate for arbitrators to replace the two requirements of identity of cause and object by the single requirement of “identity of questions in dispute”. This would avoid the problematic distinction between identity of cause and object.

avoid the *res judicata* effects of a prior judgment by unduly invoking a separate legal identity. A common law-style “privity of interest” test appears appropriate to assess the “sameness” between parties. The test would be met where the parties are either formally identical or so closely related as to represent virtually the same interests¹⁰⁷⁴. However, arbitral tribunals must be careful to not unduly restrict the right of access to justice of a party with different interests, which may be the result of an overly broad interpretation of the identity of parties requirement¹⁰⁷⁵.

718. Where the identity test is not met, arbitral tribunals should always take the prior judgment into consideration in order to avoid contradictory decisions. Shany suggests the application of the principle of judicial comity which encourages tribunals to consider following the conclusions of law and fact reached by a prior court. This may provide arbitral tribunals with a way to break the legal deadlock that the current uncertainties surrounding the ascertaining of “sameness” of parties and issues entail¹⁰⁷⁶. As was seen earlier, in practice arbitral tribunals have given preclusive and conclusive effects to prior awards and judgments, even though the strict identity test was not met¹⁰⁷⁷. Although no trend as to this effect has been observed, it can be argued that the more a prior dispute is identical to the dispute before the arbitral tribunal, the more drastic preclusive and conclusive effects should be given to the prior judgment. In other words, the degree of identicalness between the disputes in both proceedings should determine the intensity of the preclusive and conclusive effects to be given to the prior judgment¹⁰⁷⁸.

¹⁰⁷⁴ See, e.g., Cour d’appel de Paris, 13 September 2007, *Société Comptoir Commercial Blidéen v Société l’Union In vivo*, Rev. arb., No. 2 (2008), pp. 313 *et seq.* While this case involved the consolidation of disputes over related contracts, the reasoning is interesting also for *res judicata* purposes. The dispute involved several parties and contracts. The arbitral tribunal decided to rule on all of the contracts and with regard to all parties in one and the same award. One of the parties challenged the award on the ground that the arbitral tribunal was wrong to do so. The court rejected the claim, noting that all of the disputed contracts were identical and were made as part of the same business relationship between the parties, whose separation was therefore purely formal. In addition, the parties did not have differing interests and they had the same director. The court concluded that the filing of a single arbitration request covering identical disputes was, moreover, a reasonable and useful procedural tactic and in everyone’s interest (see AUDIT, *French Court Decisions on Arbitration*, para. 17, p. 18).

¹⁰⁷⁵ SHANY, *Similarity in the Eye of the Beholder*, p. 131.

¹⁰⁷⁶ SHANY, *Similarity in the Eye of the Beholder*, p. 138.

¹⁰⁷⁷ See *supra*, paras 482 *et seq.*

¹⁰⁷⁸ This was argued by BREKOULAKIS with regard to the party identity requirement (pp. 195 *et seq.*).

1.3.2. Is the prior judgment capable of recognition in the country of the arbitral seat?

719. It is generally considered a requirement for the application of the *res judicata* doctrine that a foreign judgment must be capable of recognition in the country of the subsequent proceedings¹⁰⁷⁹. The purpose of this requirement is twofold: on the one hand, it seeks to avoid the coexistence in one jurisdiction of contradictory decisions that are equally enforceable. On the other hand, it seeks to allow a party that cannot use the foreign judgment for enforcement purposes in the relevant jurisdiction to pursue the case there in order to open up for the possibility of local enforcement¹⁰⁸⁰. The requirement is plainly justified in private international litigation, because the jurisdiction of state courts normally is not based solely on a choice of court agreement, but on contacts with the country (*e.g.* a domicile or a place of business) that are sufficiently close to justify the jurisdiction of the country's courts. However, the situation is different in international arbitration. Ordinarily, the arbitral seat is chosen precisely because neither of the parties had any connection there.

720. According to Söderlund the question of whether a prior judgment is enforceable at the place of arbitration is normally of slight interest to the parties. Due to the lack of connection with the arbitral seat neither of the parties would foresee any need for enforcement measures at the arbitral seat in the future. What is relevant is not whether the prior judgment is capable of recognition and enforcement at the arbitral seat, but whether the national court had jurisdiction to render the judgment¹⁰⁸¹.

721. In addition, it may be argued that if the existence of an arbitral legal order is admitted, then the question whether the prior judgment is capable of recognition in the country of the arbitral seat is (at least in theory) of no importance to the arbitral legal order. The proper question is whether the prior judgment is capable of recognition in the arbitral legal order. This will not be the case if the national court had rendered the prior judgment in violation of an arbitration agreement.

¹⁰⁷⁹ SHEPPARD, *Res Judicata and Estoppel*, p. 232.

¹⁰⁸⁰ SÖDERLUND, p. 303.

¹⁰⁸¹ SÖDERLUND, pp. 305 *et seq.*

722. Rather than verifying whether the prior judgment is capable of recognition in the country of the arbitral seat, it appears more appropriate for arbitral tribunals to examine whether the prior judgment was “valid”, *i.e.* whether it was rendered in conformity with Article II (3) NYC and due process principles.

723. It may in any case be prudent for arbitral tribunals to verify whether a prior judgment is capable of recognition in the country of the arbitral seat. Where a request for recognition or enforcement has already been brought at the arbitral seat, the arbitral tribunal may deem it appropriate to await the enforcement court’s decision. However, where no such request has been brought, the arbitral tribunal may have to predict whether the judgment will be capable of recognition at the arbitral seat¹⁰⁸². This is important if the local courts cannot be expected to render a decision on the issue within a reasonable period of time¹⁰⁸³. The arbitrators will normally have to determine whether the prior court had jurisdiction in the international sense and whether the judgment is in conformity with the public policy of the arbitral seat. The foreign court’s international jurisdiction should be denied if the judgment was rendered in violation of Article II (3) NYC¹⁰⁸⁴.

724. The test to determine whether a foreign judgment is capable of recognition in the country of the arbitral seat thus closely resembles the proposed test as to the “validity” of the prior judgment. If the judgment is capable of recognition in the country of the arbitral seat it will likely also be “valid”.

725. By contrast, a judgment that is not capable of recognition in the country of the arbitral seat might still be considered as “valid” and afforded *res judicata* effects in the arbitration. Whether an arbitral tribunal should give *res judicata* effects to a judgment that cannot be recognised at the arbitral seat should depend on the reason for which recognition has been denied. A court’s decision denying interim relief may not be recognised in the country of the arbitral seat simply because decisions on interim relief

¹⁰⁸² In some countries, such as France, while arbitrators may predict a foreign judgment’s “recognisability”, they do not have the authority to decide whether a foreign judgment will be recognised in the country of the arbitral seat (see, e.g., PINNA, para. 17).

¹⁰⁸³ See MAYER, *Litispence, connexité et chose jugée dans l’arbitrage international*, p. 199.

¹⁰⁸⁴ This was the solution adopted by the Swiss Federal Tribunal in *Compania Minera Condesa SA v BRGM-Perou SAS* (ATF 124 III 83, 87). See also SÖDERLUND, pp. 304 *et seq.*

do not qualify as “decisions capable of recognition” in that country¹⁰⁸⁵. However, if the national court had jurisdiction to render the decision denying interim relief, if principles of due process were observed and if there was no change in circumstances, preclusive effects should be given to the court’s decision¹⁰⁸⁶. By contrast, where a foreign judgment was not recognised because it violates public policy considerations of the arbitral seat, an award that gives *res judicata* effects to the foreign judgment might be set aside.

1.4. Conclusion

726. Transnational law should govern questions of *res judicata* arising out of judgments before international arbitral tribunals. While national laws may serve as guidance, transnational law should ultimately determine which type of national court decision should be able to operate as a *res judicata* in arbitration proceedings. It should also determine the scope of the *res judicata* effects to be given to a prior judgment, as well as the requirements for the application of the *res judicata* doctrine.

727. Judicial decisions rendered by a judicial court or tribunal that finally and conclusively determine a dispute “on the merits” may have *res judicata* effects in an arbitration. Reference to the law of the country where the judgment was rendered may be required to determine whether the decision was rendered by a judicial tribunal with competent jurisdiction and whether the decision is final and conclusive. However, whether a judgment is “on the merits” for *res judicata* purposes should be determined autonomously. While decisions determining the substance of a dispute should operate as a *res judicata*, the same should not apply to court decisions regarding the arbitral jurisdiction. Likewise, while court decisions denying interim relief should have preclusive effects before arbitral tribunals seised of an identical request for interim relief, this should not apply to court decisions granting such a request.

728. A judgment that qualifies as a *res judicata* should have only claim preclusive effects in subsequent arbitration proceedings. While arbitral tribunals should be bound by the final determination of a matter that constituted the main issue in the court

¹⁰⁸⁵ This seems to be the case in Switzerland (see, e.g., Order No. 5 of 2 April 2002).

¹⁰⁸⁶ See *supra*, paras 677 *et seq.*

proceedings, they should not be bound by a court's ruling on a preliminary issue, even if this issue was essential for the judgment. Such decisions that were contained in the reasons of the judgment should not have *res judicata* effects in the arbitration so as to allow the arbitrators to determine the dispute before them based on their own conclusions and convictions. However, arbitral tribunals should have the authority to adopt or depart from earlier rulings on preliminary issues if they consider this appropriate. Likewise, the application of the abuse of process doctrine should also be discretionary.

729. Finally, with regard to the *res judicata* requirements, while arbitral tribunals should generally apply the traditional identity test, it is contended that arbitral tribunals should seek to develop a test that is based on transnational law and guided by the *abus de droit* principle. Before granting *res judicata* effects to a prior judgment, arbitral tribunals should also verify that the judgment in question is "valid". This test should largely coincide with the test as to whether a foreign judgment is capable of recognition at the place of arbitration.

2. *RES JUDICATA* IN CASE OF PRIOR ARBITRAL AWARDS BEFORE INTERNATIONAL ARBITRAL TRIBUNALS

730. Substantially the same *res judicata* principles should apply where the prior decision is an arbitral award. Hence, much of the forgoing analysis applies *mutatis mutandis* where the prior decision is an award.

731. As in the first part of this chapter, an introductory remark needs to be made with regard to the relevance of domestic laws. The *lex arbitri* governing both the first and second arbitration will generally be silent with regard to *res judicata* and will thus be of little relevance. Furthermore, because of the autonomy of international arbitration from national legal systems, the domestic *res judicata* rules of the first and second arbitral seat do not bind international arbitrators.

732. It is contended that arbitral tribunals should adopt a full transnational approach to *res judicata* where the prior decision is an award. They should seek to develop transnational rules covering all aspects of *res judicata*, including the notion of an award

that qualifies as a *res judicata* (or “*res arbitrata*”), the scope of the *res judicata* effects to be given to a prior award, as well as the requirements that need to be met for an award to operate as a *res judicata* in subsequent arbitration proceedings¹⁰⁸⁷.

733. This full transnational approach to *res judicata* must be developed by arbitral tribunals over the years. At present arbitral tribunals will sometimes refer to domestic *res judicata* rules for guidance. Arbitral tribunals may “double-check” their solutions against those domestic *res judicata* rules that have a close connection to the parties and the dispute. Furthermore, to avoid annulment of their award, the arbitrators should always consider the law of the place of arbitration. This solution was adopted by the arbitrators in ICC Case No. 13509 of 2006. The arbitrators made clear that they would look at French law merely as a source of inspiration without being bound by it, even though the seat of the arbitration was in France, the first award was rendered in France, the law governing the merits in both arbitrations was French law and both parties to the arbitration relied on French law with regard to *res judicata*. The tribunal held that, in these circumstances, it would be appropriate to look at French *res judicata* rules, always pointing out however that it was not bound by these rules¹⁰⁸⁸.

2.1. Constituent Elements of a *Res Judicata*

734. If it is generally accepted in international arbitration law that awards have *res judicata* effects, it is necessary to determine what an award is before determining the nature and extent of these effects. It is then necessary to investigate whether all or only certain types of awards may become *res judicata*. It is contended that only final arbitral awards “on the merits” rendered by an arbitral tribunal with jurisdiction over the parties and the subject matter will be capable of operating as a *res judicata*.

2.1.1. An arbitral award

735. There currently is no universal definition of the term “arbitral award”¹⁰⁸⁹. The European Convention is silent and the New York Convention merely states that

¹⁰⁸⁷ In this sense, see HASCHER, pp. 25 *et seq.*

¹⁰⁸⁸ See *supra*, para. 444.

¹⁰⁸⁹ LIEBSCHER, pp. 115 *et seq.*; ILA, *Final Report*, para. 18; LEW/MISTELIS/KRÖLL, para. 24-4.

“[t]he term ‘arbitral award’ shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted”¹⁰⁹⁰.

736. As was seen earlier, because no agreement on an acceptable general definition could be reached the term “award” was left undefined in the UNCITRAL Model Law¹⁰⁹¹. Likewise, the ICC working party on dissenting opinions and interim and partial awards did not reach a consensus on a general definition of the terms “award”, “interim award” and “partial award”¹⁰⁹². National arbitration laws often do not contain an express definition of the term “award” and the way in which the term is interpreted may vary among jurisdictions¹⁰⁹³.

737. It has been submitted that any decision that finally resolves a substantive issue affecting the rights and obligations of the parties is an award. An award concludes the dispute as to the specific issue determined in the award, disposes of the parties’ respective claims, may be confirmed by recognition and enforcement and may be challenged in the courts at the arbitral seat¹⁰⁹⁴. By contrast, procedural orders, *i.e.* decisions of the arbitral tribunal that aim at organising the procedure, relate to technical and procedural matters and are rendered without formality or reasoning, are not awards¹⁰⁹⁵.

738. A distinction must be drawn between final, partial and interim awards. While a final award resolves all the issues in the arbitration and puts an end to the arbitration proceedings rendering the arbitrators *functus officio*, a partial award only terminates the proceedings in respect of the specific issues it decided. However, a partial award is “final” in the sense that it is binding on the parties and subject to the means of recourse every arbitration law makes applicable to (full) final awards¹⁰⁹⁶.

¹⁰⁹⁰ Article I (2) NYC.

¹⁰⁹¹ See *supra*, paras 408 *et seq.*

¹⁰⁹² See LIEBSCHER, p. 115.

¹⁰⁹³ See *supra*, paras 380 and 394.

¹⁰⁹⁴ LEW/MISTELIS/KRÖLL, paras 24.12 *et seq.* See also REDFERN/HUNTER/BLACKABY/PARTASIDES, paras 9-05 *et seq.* LIEBSCHER proposes to define an “award” as an act capable of direct challenge before the courts at the arbitral seat (p. 115).

¹⁰⁹⁵ LEW/MISTELIS/KRÖLL, paras 24-5 *et seq.*

¹⁰⁹⁶ LEW/MISTELIS/KRÖLL, paras 24-16 *et seq.*

739. The term “interim award” is often used interchangeably with that of “partial award”¹⁰⁹⁷. To avoid confusion Lew, Mistelis and Kröll¹⁰⁹⁸ suggest that the term “partial award” should cover all awards that settle specific issues before the arbitrators, including issues of jurisdiction, applicable law or liability. By contrast, the term “interim award” should only designate awards that are not “final” in the sense that they do not finally determine an issue and cannot be challenged independently from the final award (e.g. an award making orders for interim relief)¹⁰⁹⁹. They do not terminate any aspect of the dispute before the arbitrators.

740. According to ILA, because no international consensus is likely to emerge in the near future regarding the characterisation of awards and procedural orders, the *lex arbitri* of the first arbitration should determine whether a prior decision constitutes an award for the purposes of *res judicata*¹¹⁰⁰. ILA thereby transposes to arbitral awards the conflict-of-laws rule generally applicable to national court judgments. While this may be acceptable in principle, it is at odds with an autonomous conception of international arbitration. Arbitral tribunals should develop a transnational term of “award” capable of operating as a *res judicata*. Arbitrators should not be bound by the *lex arbitri* of the prior award, but may look at it for guidance¹¹⁰¹.

741. Based on the above, it is submitted that all final arbitral awards (full and partial) should be considered as an “award” capable of operating as a *res judicata*.

2.1.2. A final and binding arbitral award

742. There is no consensus among national laws as to the moment when awards become *res judicata*. An arbitral award may be *res judicata* as of the time the award is

¹⁰⁹⁷ LEW/MISTELIS/KRÖLL, para. 24-24. See also REDFERN/HUNTER/BLACKABY/PARTASIDES, paras 9-19 *et seq.*; FOUCHARD/GAILLARD/GOLDMAN, para. 1357; RUBINO-SAMMARTANO, pp. 736 *et seq.*; BERGER, p. 588.

¹⁰⁹⁸ See also FOUCHARD/GAILLARD/GOLDMAN, para. 1359; BERGER, p. 591.

¹⁰⁹⁹ LEW/MISTELIS/KRÖLL, paras 24-24 *et seq.*

¹¹⁰⁰ ILA, *Final Report*, para. 18.

¹¹⁰¹ In this sense, see HASCHER who refers to ICC Case No. 6079 of 1992 where an arbitral tribunal, based on a broad arbitration agreement, competence-competence, as well as the principle of party autonomy held that it was not bound by its own prior (interim) decision (p. 27).

rendered¹¹⁰², signed¹¹⁰³, communicated to the parties¹¹⁰⁴ or at such time as means of recourse can no longer be instituted against the award¹¹⁰⁵. As was seen above, no provision specifying the date when an award becomes *res judicata* was included in the UNCITRAL Model Law due to the lack of agreement as to which date should be retained¹¹⁰⁶.

743. According to ILA's Recommendation No. 3.1, an arbitral award should become *res judicata* when it has become final and binding in the country of origin. The final report specifies that this means that it can no longer be challenged before the domestic courts at the place of arbitration: either no challenge can be brought against the award or a challenge has been denied by a final decision of a domestic court at the place of arbitration¹¹⁰⁷. Hence, an award should not be given preclusive and conclusive effects as of the moment it constitutes a *res judicata* pursuant to the *lex arbitri* (namely when it is rendered, communicated to the parties or other), but as of the moment it can no longer be challenged before the supervisory courts at the arbitral seat¹¹⁰⁸.

744. At first sight, ILA's recommendation seems at odds with the autonomous nature of international arbitration. Accordingly, arbitral tribunals should develop a transnational *res judicata* rule stipulating the moment at which arbitral awards should be considered as final for *res judicata* purposes. This should be the moment at which the award can no longer be modified, *i.e.* once it is binding on the parties and the tribunal that rendered it. Drawing a parallel with Article V(1)(e) NYC, this could be the moment when the award has become "binding" for purposes of recognition and enforcement. The term "binding" under Article V (1)(e) NYC must be given an autonomous interpretation in the sense that it is not subject to national law determination. The award becomes "binding" at a moment prior to the setting aside proceedings, namely if it is not open to appeal on the merits before a judge or an appeal arbitral tribunal¹¹⁰⁹. If

¹¹⁰² See, *e.g.*, Article 1476 NCPC.

¹¹⁰³ See, *e.g.*, Article 824 bis Italian Arbitration Act 2006.

¹¹⁰⁴ See, *e.g.*, Article 190 (1) PILA.

¹¹⁰⁵ See, *e.g.*, Article 1703 Judicial Code (Belgium).

¹¹⁰⁶ See *supra*, paras 406 *et seq.*

¹¹⁰⁷ ILA, *Final Report*, para. 31.

¹¹⁰⁸ In this sense see also RUBINO-SAMMARTANO, p. 797.

¹¹⁰⁹ VAN DEN BERG, p. 395 ; LEW/MISTELIS/KRÖLL, para. 26-101;

the award may be recognised and enforced once it has become “binding”, then it should also have *res judicata* effects at that moment¹¹¹⁰.

745. However, for reasons of coherence and efficiency, it may be appropriate for arbitral tribunals to grant *res judicata* effects to awards only if they can no longer be challenged at the arbitral seat. Where the deadline for bringing annulment proceedings has not yet expired or where annulment proceedings have been brought, it may be preferable for arbitral tribunals to await the expiration of the deadline or outcome of annulment proceedings, rather than to give *res judicata* effects to a prior award that might not stand the test of time.

2.1.3. A valid arbitral award

746. According to ILA, awards must not only be final, but also valid pursuant to the *lex arbitri* of the prior arbitration proceedings. Awards set aside at the prior arbitral seat will no longer be valid and thus no longer produce conclusive and preclusive effects¹¹¹¹.

747. If the existence of an arbitral legal order is admitted, then (in theory) an annulled award does not lose its validity for purposes of *res judicata*. Consequently, annulled awards may be given *res judicata* effects in further arbitration proceedings. However, for reasons of legal coherence, certainty and efficiency, it generally does not appear useful to give *res judicata* effects to annulled awards in practice. The parties have chosen the supervisory courts at the first arbitral seat to review the award. If these supervisory courts annul the award it should not be given *res judicata* effects in subsequent arbitration proceedings, as this may lead to irreconcilable decisions which may be enforced in parallel in different countries.

748. Accordingly, in order for an award to operate as a *res judicata* it should be valid in the sense that it was not annulled at the arbitral seat. As will be discussed below, an arbitral award should also not be considered as valid for *res judicata* purposes if it was

REDFERN/HUNTER/BLACKABY/PARTASIDES, para. 11-85; RUBINO-SAMMARTANO, pp. 791 *et seq.*

¹¹¹⁰ BERGER recommends that the arbitrators reach an agreement with the parties to fix in the award the exact moment at which it becomes *res judicata* (BERGER, pp. 613 *et seq.*).

¹¹¹¹ ILA, *Final Report*, paras 32 *et seq.*

refused recognition or enforcement in the country of the subsequent arbitral seat for one of the grounds listed in Article V (1) NYC¹¹¹².

2.1.4. An arbitral tribunal with jurisdiction over the parties and the subject matter?

749. For the reasons discussed below, the question of the jurisdiction of the first arbitral tribunal is part of the validity of the prior award, examined in the previous section.

750. As in case of a prior court judgment, where a prior award is invoked before an arbitral tribunal the arbitrators must begin by examining their own jurisdiction. The tribunal should be able to examine its own jurisdiction if one party contests the jurisdiction of the prior tribunal¹¹¹³. If the arbitral tribunal accepts jurisdiction over the dispute, it excludes at the same time the jurisdiction of the prior tribunal.

751. It is doubtful whether the second arbitral tribunal is the appropriate forum for reviewing the jurisdiction of the first tribunal. If one party contests the jurisdiction of the first tribunal, it should do so before the supervisory courts of the first arbitral seat¹¹¹⁴. These courts (not a further arbitral tribunal) have been chosen by the parties to review the prior award, including the prior arbitral tribunal's decision on jurisdiction. In addition, arbitral tribunals are generally reluctant to erect themselves as "appeal bodies" and to review the awards of other arbitral tribunals¹¹¹⁵. Most arbitral tribunals will not review a prior tribunal's assessment of the arbitration agreement, but will await the outcome of annulment proceedings.

752. As will be discussed in further detail below, where the arbitration proceedings giving rise to the prior award were held in a different country, the second arbitral tribunal may have to predict whether the prior award will be capable of recognition at the second place of arbitration¹¹¹⁶. This may involve an assessment as to whether the

¹¹¹² See *infra*, para. 801.

¹¹¹³ MAYER, *Litispence, connexité et chose jugée dans l'arbitrage international*, p. 196.

¹¹¹⁴ BORN, p. 2915, fn 169.

¹¹¹⁵ See, in particular, ICC Case No. 3383, 1979 (*supra*, paras 445 *et seq.*). See also MAYER, *Litispence, connexité et chose jugée dans l'arbitrage international*, p. 196.

¹¹¹⁶ See *infra*, paras 797 *et seq.*

prior award was based on a valid arbitration agreement pursuant to the law chosen by the parties or, in the absence of such choice, the *lex arbitri*¹¹¹⁷. Where the prior award was not challenged or where the annulment court denied a lack of jurisdiction, the second arbitral tribunal will generally not have to review again the validity of the arbitration agreement. However, the second arbitral tribunal may have to determine whether the dispute in the first arbitration is arbitrable pursuant to the law of the enforcement country, *i.e.* the arbitral seat of the subsequent arbitration proceedings¹¹¹⁸.

2.1.5. An arbitral award “on the merits”

753. According to ILA, only full final awards (including consent awards), partial final awards and awards on jurisdiction may qualify as *res judicata*. This means that only awards that contain final determinations may operate as a *res judicata* in subsequent arbitration proceedings, whether these determinations are on the merits or on jurisdiction¹¹¹⁹. By contrast, no *res judicata* effects should attach to prior provisional awards or procedural orders¹¹²⁰. This is in line with the above conclusions regarding the definition of an award. As was seen, the term “award” generally describes arbitral decisions that finally determine the specific issues with which they deal, covering full final and partial final awards as defined above¹¹²¹.

754. The above is also corroborated by the survey of arbitration case law conducted in chapter three, which has shown that *res judicata* issues arise primarily in case of a prior final (full or partial) award on the merits or on jurisdiction. In addition, the survey has highlighted the situations in which a prior award is most likely to give rise to *res judicata* issues in subsequent arbitration proceedings: while *res judicata* issues may arise with respect to prior awards on the merits in an identical case, in most cases the prior award on the merits was rendered in a slightly different case. Furthermore, on several

¹¹¹⁷ Article V (1)(a) NYC.

¹¹¹⁸ Article V (2) (a) NYC.

¹¹¹⁹ ILA, *Final Report*, para. 19.

¹¹²⁰ ILA, *Final Report*, paras 19 and 22. The ILA recommendations on *res judicata* do not apply to awards regarding interim measures. Admittedly, awards granting interim relief can never be final and conclusive in the sense that they may be rescinded or modified by the arbitral tribunal in case of a change in circumstances. However, as in case of national court decisions on interim relief, it appears that awards regarding interim measures should have some temporary *res judicata* effects (see *supra*, paras 677 *et seq.*).

¹¹²¹ See *supra*, paras 737 *et seq.*

occasions arbitral tribunals had to decide whether they should be bound by prior positive or negative decisions on jurisdiction. Finally, it was seen that arbitral tribunals had to determine whether and to what extent they should be bound by their own prior partial awards.

755. It is necessary to further investigate which type of prior award should be able to operate as a *res judicata* in a subsequent arbitration, *i.e.* which type of prior award should be considered as rendered “on the merits” for purposes of *res judicata*.

2.1.5.1. Prior full final award in an identical case

756. A prior full final award in an identical case will be considered as “on the merits” for *res judicata* purposes. Such awards are clearly covered by Article III NYC.

757. As in case of prior judgments, the situation where a prior full final award was rendered on the merits in exactly the same case should be rare and may typically arise where one party contests the jurisdiction of the prior tribunal. Hence, the central question is whether the subsequent arbitral tribunal should be entitled to determine its own jurisdiction and re-arbitrate the dispute if it finds that it has jurisdiction over the parties and the subject matter. This will necessarily entail an implicit ruling on the jurisdiction of the prior tribunal.

758. As suggested earlier, arbitral tribunals will generally not review the prior arbitral tribunal’s jurisdiction¹¹²². Unless the parties have waived the *res judicata* effects of the prior award, arbitral tribunals will most likely refuse to re-open the case where the prior tribunal has accepted jurisdiction and has rendered a full final award on the merits in an identical case.

759. Reconsidering the dispute in such circumstances would generally be contrary to principles of procedural efficiency and economy. It may be a waste of valuable resources if the prior award was rendered (or recognised) in the country where the subsequent arbitral tribunal has its seat; the second award may well be set aside if it is irreconcilable with the prior award. In this case, it will also not be recognised and

¹¹²² See *supra*, para. 750.

enforced in most other countries.

760. It may be argued that where a prior award was rendered on the merits in an identical case, then a new arbitral tribunal cannot decide the same dispute based on the same arbitration agreement. The arbitration agreement is not valid or operable anymore¹¹²³. The exception is where the parties have waived the *res judicata* effects of the prior award and agreed to resubmit the dispute to arbitration¹¹²⁴. However, in the absence of such a waiver, a new award would be considered as rendered without jurisdictional basis and thus risk being set aside at the arbitral seat and refused recognition and enforcement pursuant to Article V (1) (a) NYC.

761. This argument seems valid only if the arbitration agreement gave jurisdiction to the prior arbitral tribunal. If the subsequent arbitral tribunal considers that it has jurisdiction over the parties and the dispute based on the arbitration agreement in question, then this arbitration agreement cannot be considered as having been “used up” by the prior tribunal. The question therefore boils down to whether the subsequent arbitral tribunal is bound by the prior tribunal’s decision on jurisdiction. This will be discussed in further detail below¹¹²⁵.

762. At this point it may be noted that if the arbitrators consider that they have jurisdiction over the parties and the dispute and that it would be appropriate for them to exercise this jurisdiction, then they should in principle be allowed to do so, taking the prior award into consideration to avoid a waste of resources and conflicting decisions. This result flows from the fact that arbitral tribunals are not interchangeable, even between each other.

¹¹²³ See MAYER, *Litispence, connexité et chose jugée dans l'arbitrage international*, p. 196. See also SCHLOSSER, *Conflits entre jugement judiciaire et arbitrage*, p. 374. According to SCHLOSSER, the prior (national court) decision must have become *res judicata*.

¹¹²⁴ In this case it may be argued that the parties have concluded a new arbitration agreement. See PCA, *The Government of Sudan v The Sudan People’s Liberation Movement/Army*, Final Award, 22 July 2009, paras 450 *et seq.* (“Whatever the [*res judicata*] status of the ABC Experts’ Report, the Arbitration Agreement concluded by the Parties in 2008 had the effect of reopening questions that had been accepted as ‘final and binding,’ thus novating the issues for decision in accordance with the contingencies in Article 2. When both Parties consented to this arbitration, that consent extended to all the matters provided under Article 2 of the Arbitration Agreement, and had the effect of re-opening the ABC Experts’ Report to ‘excess of mandate’ review under Article 2(a) and a potential new delimitation exercise under Article 2(c)”).

¹¹²⁵ See *infra*, paras 770 *et seq.*

763. Considerations of legal coherence, certainty and efficiency will frequently militate against reconsidering the dispute. A situation where it might be appropriate for an arbitral tribunal to reconsider a dispute is where the previous award is a default award. In this case the subsequent tribunal must be careful not to violate a party's right to due process (in particular, its right to a "day in court") by refusing to decide the dispute brought before it by the party who failed to participate in the prior arbitration. In general, a party should not be under an obligation to participate in an arbitration if it considers the arbitral tribunal to lack jurisdiction. However, default awards are generally acceptable provided each party was given an opportunity to present its case and to reply to the arguments of the other party. If there is evidence that copies of all notices and submissions were sent to the parties in time and by recorded delivery and the defaulting party simply refused to participate, then the award will normally be acceptable¹¹²⁶. If the default award was not challenged by the defaulting party or was upheld by the supervisory courts of the arbitral seat, then a subsequent arbitral tribunal should generally not reconsider the dispute¹¹²⁷.

2.1.5.2. Prior full final award in a different case

764. As in case of a prior national court judgment, a prior award that finally disposes of the merits of a dispute in a case that overlaps to a certain degree with the one before the second tribunal may generally be considered as "on the merits" for *res judicata* purposes.

765. As in the first part of this chapter, the question concerns the scope of *res judicata* effects that arbitral tribunals can or should afford to prior awards. It will be examined in further detail below¹¹²⁸.

2.1.5.3. Prior partial final award

766. Partial final awards that finally determine specific issues before the arbitrators and can be challenged before the supervisory courts of the arbitral seat are generally

¹¹²⁶ LEW/MISTELIS/KRÖLL, para. 24-32.

¹¹²⁷ See BORN, pp. 2913 *et seq.*

¹¹²⁸ See *infra*, paras 775 *et seq.*

recognised as having *res judicata* effects in the same manner as full final awards¹¹²⁹. As full final awards, they are covered by Article III NYC and must therefore be recognised as binding.

767. The above should hold true whether the *res judicata* effect of a prior partial award is invoked before a different arbitral tribunal or before the same tribunal. This being said, the principle that a partial award has *res judicata* effect before the tribunal that rendered it might give rise to problems in practice. In the debate of 7 February 2001 on the *res judicata* effects of arbitral awards, Reymond noted that problems may arise, for example, if the arbitrators realise at a later stage in the proceedings that they did not consider certain issues of fact or law important to the decision in the prior partial award. In such a situation, arbitrators will seek to limit the scope of the *res judicata* effect of the prior partial award as much as possible. Hascher confirmed that on several occasions arbitral tribunals have reverted to “*des acrobaties qui sont quand même difficiles à accepter*”¹¹³⁰ to avoid the *res judicata* effect of their own partial awards. While the arbitral tribunals stated that they were merely interpreting their partial award, in reality they were reconsidering the prior decision¹¹³¹.

768. The interests of finality, efficiency and legal certainty appear to outweigh these difficulties and they should therefore not give rise to an exception to the *res judicata* effect of prior partial awards. Difficulties may be mitigated if arbitral tribunals follow a cautious approach with regard to the rendering of partial awards. Where one party requests a partial award against the will of the other party, arbitral tribunals may prefer to render a single final award or comply with the party’s request only after receiving the submissions of both parties and giving each party an opportunity to explain its position¹¹³².

769. A widely accepted exception to *res judicata* exists where a prior award has been procured by fraud. As was seen earlier, in *Antoine Biloune et al v Ghana Investments Centre et*

¹¹²⁹ BORN, p. 2913; SHEPPARD, *The Scope and Res Judicata Effect of Arbitral Awards*, p. 279; LEW/MISTELIS/KRÖLL, para. 24-17.

¹¹³⁰ HASCHER, p. 39.

¹¹³¹ HASCHER, pp. 38 *et seq.*

¹¹³² REDFERN/HUNTER/BLACKABY/PARTASIDES, para. 9-28. See also BERGER, p. 592.

al the UNCITRAL tribunal, applying customary principles of international law, held that it would exceptionally reconsider its prior partial award if it was shown by credible evidence that the tribunal had been the victim of fraud and that its determinations in the previous award were based on false testimony¹¹³³.

2.1.5.4. *Prior award on jurisdiction*

770. The question whether an arbitral tribunal's decision on jurisdiction may operate as a *res judicata* in subsequent arbitral proceedings merits special attention.

771. The question whether the arbitral tribunal's decision on jurisdiction may be considered as a genuine award is disputed among scholars¹¹³⁴. However, several leading commentators affirm that both positive and negative arbitral decisions on jurisdiction constitute "genuine arbitral awards"¹¹³⁵ and are thus capable of operating as a *res judicata* in further arbitration proceedings. There is no reason why awards on jurisdiction should not be entitled to the same *res judicata* effects as other arbitral awards¹¹³⁶. As awards they must also be recognised as binding by national courts pursuant to Article III NYC.

772. This is also the position taken by ILA who cautiously submits that the recommendations on *res judicata* and arbitration "do not exclude" giving *res judicata* effects to awards on jurisdiction. A negative jurisdictional award on jurisdiction entails a final decision that there is no valid arbitration agreement covering the dispute or the parties in question. Conversely, a positive jurisdictional award finally decides that such

¹¹³³ See *supra*, paras 479 *et seq.*

¹¹³⁴ According to BOO, arbitral decisions on jurisdiction do not constitute awards under the UNCITRAL Model Law because they cannot be challenged under Article 34 ML. However, BOO argues that a tribunal's negative ruling on jurisdiction under Article 16 ML is final and binding, but only with regard to the particular arbitral proceedings in which the decision was rendered. For BOO, positive rulings on jurisdiction cannot be considered as awards. Although BOO does not state this expressly, he appears to suggest that the tribunal's positive ruling on jurisdiction should be considered final and binding, at least once upheld by the supervisory courts (BOO, pp. 128 *et seq.*). JONES submits that a tribunal's decision on jurisdiction can never be final and binding, because it can always be reviewed by the supervisory courts at the arbitral seat. In addition, the courts in the country of enforcement are also entitled to review an arbitral tribunal's decision on jurisdiction pursuant to Article V (1)(a) NYC. The only situation where an arbitral tribunal's decision on jurisdiction is final and binding is where the parties have concluded an *ad hoc* agreement to arbitrate an existing dispute about jurisdiction which expressly gives the arbitrators the sole jurisdiction to decide questions of jurisdiction arising under the agreement (JONES, p. 63).

¹¹³⁵ FOUCHARD/GAILLARD/GOLDMAN, para. 1357.

¹¹³⁶ BORN, pp. 2914 *et seq.*; LEW/MISTELIS/KRÖLL, para. 24-24; SHEPPARD, *The Scope and Res Judicata Effect of Arbitral Awards*, p. 278; POUURET, *Concluding Remarks on Relationship Between State Courts and Arbitral Tribunals*, p. 156.

an agreement exists. The mere fact that these jurisdictional awards may be challenged before the supervisory courts has no impact on their capacity to operate as *res judicata*. If the jurisdictional award is annulled it will not be considered a valid award and may not operate as a *res judicata*¹¹³⁷.

773. It has already been argued above that because arbitral tribunals are not interchangeable between each other, they should in principle be allowed to rule on their jurisdiction if seised of a dispute, despite the existence of a prior arbitral award in an identical or related case¹¹³⁸. Because the arbitrators owe a primary duty to the parties, they are entitled to determine independently whether and to what extent they have jurisdiction over the particular dispute before them. They generally must exercise this jurisdiction if there is a valid arbitration agreement conferring jurisdiction upon the arbitral tribunal. Likewise, there appears to be no reason to treat prior awards on jurisdiction differently to prior judgments on jurisdiction. Accordingly, arbitral tribunals should generally not be bound by a prior decision on jurisdiction. Giving due consideration to the jurisdictional ruling of the prior arbitral tribunal, the subsequent tribunal should be entitled to reach its own conclusions regarding the existence and scope of its jurisdiction¹¹³⁹.

774. It was seen above that one central consideration for denying *res judicata* effects to a prior national court ruling on the jurisdiction of the arbitral tribunal is to protect international arbitration against national court interventions the purpose of which is to frustrate the arbitration agreement¹¹⁴⁰. This concern to protect the arbitration process also exists where the prior decision on jurisdiction was rendered by another arbitral tribunal. A party may initiate arbitration proceedings in order to sabotage another arbitration. Arguably, the concern may be less strong as in case of prior court decisions on jurisdiction. Considerations of putting an end to the dispute, avoiding the wasteful duplication of proceedings and contradictory awards may thus prevail in most cases. Accordingly, where a prior arbitral tribunal has rendered an award on the existence and

¹¹³⁷ IIA, *Final Report*, para. 20.

¹¹³⁸ See *supra*, para. 762.

¹¹³⁹ This appears to be the approach followed by Swiss arbitration law (in the *lis pendens* context) in Art. 186 para. 1bis PILA.

¹¹⁴⁰ See *supra*, paras 668 *et seq.*

validity of the arbitration agreement and this award was not challenged or was upheld by the supervisory courts at the arbitral seat, a subsequent arbitral tribunal will likely afford preclusive effects to the prior award and not reconsider the issue of jurisdiction.

2.2. The Scope of *Res Judicata* Effects to be Afforded to Prior Arbitral Awards in Arbitration Proceedings

775. The ILA Recommendations provide for broad *res judicata* effects of awards, covering claim preclusion, issue preclusion and abuse of process. The *res judicata* effects of an award also cover its underlying reasoning¹¹⁴¹. Recommendation No. 4 states:

“An arbitral award has conclusive and preclusive effects as to:

- 4.1 determinations and relief contained in its dispositive part as well as in all reasoning necessary thereto;
- 4.2 issues of fact or law which have actually been arbitrated and determined by it, provided any such determination was essential or fundamental to the dispositive part of the arbitral award; and
- 4.3 a claim, cause of action or issue of fact or law which could and should have been raised in prior proceedings resulting in the award, provided the raising of any such new claim, cause of action or new issue of fact or law amounts to an abuse of process or procedural unfairness”.

776. This position is also taken by Born, according to whom such broad common law-style *res judicata* effects of awards are in line with the expectations of the parties regarding finality, as well as the objectives of the arbitral process¹¹⁴². According to Veeder, while awards should give rise to a plea of issue estoppel, it is highly unlikely that the abuse of process doctrine may apply in international arbitration¹¹⁴³. Finally, Mayer submits that awards may give rise to claim preclusion and abuse of process in subsequent arbitral proceedings. The doctrine of issue estoppel may apply in limited

¹¹⁴¹ ILA, *Final Report*, paras 51 *et seq.*

¹¹⁴² BORN, pp. 2894 and 2912.

¹¹⁴³ VEEDER, pp. 75 and 77.

circumstances only¹¹⁴⁴.

777. The lack of interchangeability between arbitral tribunals calls for a certain limitation of the *res judicata* effects of awards, akin to the effects afforded to prior judgments in international arbitration. Accordingly, much of what was said with regard to the scope of *res judicata* effects to be afforded to prior judgments applies *mutatis mutandis* with respect to prior awards¹¹⁴⁵. However, for the reasons discussed below, it is contended that issue preclusive effects may be justified where a specific issue was finally and necessarily determined in a prior partial award. Reasons underlying a prior award should only be given *res judicata* effects where a prior partial award is relied upon before the arbitral tribunal that rendered it.

778. As in case of prior judgments, the question of claim preclusion will most likely arise in a situation where the prior and subsequent arbitral proceedings overlap with regard to certain issues. Where the prior tribunal finally decided a specific question X as the main issue in the arbitration, the subsequent arbitral tribunal before which question X arises as a preliminary issue should be bound by the prior tribunal's award.

779. Conversely, where the prior arbitral tribunal rendered a decision on a preliminary issue X and this issue arises again in the subsequent arbitration as a main issue, the second arbitral tribunal should not be bound by the prior tribunal's determinations, even if the preliminary issue determined in the first proceedings was essential to the first award. The subsequent arbitral tribunal has the greater interest in deciding question X. The parties wanted to submit question X to the subsequent tribunal for final determination and this will should be respected¹¹⁴⁶.

780. The same should apply where the prior arbitral tribunal decided the preliminary issue X and the same preliminary issue arises again before a subsequent arbitral tribunal seised of a different claim between the same parties. As in case of prior judgements, the subsequent arbitral tribunal must be allowed to decide the dispute brought before it

¹¹⁴⁴ MAYER, *Litispence, connexité et chose jugée dans l'arbitrage international*, pp. 195 et seq.

¹¹⁴⁵ See *supra*, paras 688 et seq.

¹¹⁴⁶ This solution was adopted in Case No. 1491 of 1992 before the Chamber of National and International Arbitration of Milan. See also TRAIN, *Les contrats liés devant l'arbitre du commerce international*, para. 636 and para. 682, fn 34.

based on its own reasons and convictions. For reasons of procedural efficiency and to avoid contradictory decisions on preliminary issues, the subsequent arbitral tribunal should take the prior tribunal's determinations into account and adopt them as far as possible.

781. It emerges from the above that the *res judicata* effects of an arbitral award should in principle not extend to the award's reasons. This is in line with the presumed intentions of the parties. When submitting a particular dispute to arbitration, the parties generally do not agree to be bound by an arbitral tribunal's reasoning, but only by the tribunal's determination of their dispute in the award. Hence, only the award, but not its underlying reasoning should operate as a *res judicata* in subsequent arbitration proceedings. It is via this reasoning that the prior tribunal reached its conclusions with regard to the dispute submitted to it. While the subsequent arbitral tribunal should take this reasoning into account, it should have the same authority to decide the particular dispute before it as the prior tribunal, based on its own reasons and opinions¹¹⁴⁷.

782. For the reasons discussed in the first part of this chapter, it appears preferable not to impose the application of issue preclusion principles in international arbitration, but rather to give arbitral tribunals the authority to adopt or depart from rulings on particular issues necessarily and finally decided in a prior award's underlying reasoning¹¹⁴⁸.

783. This conclusion is not altered by the fact that some arbitral tribunals have afforded *res judicata* effects to a prior award's reasoning. Importantly, in these cases the arbitral tribunals gave *res judicata* effects to a prior award's reasons because this was provided for by the law governing *res judicata*. In ICC Cases Nos 2745 & 2762 of 1977 the arbitral tribunal granted *res judicata* effects to the prior award's underlying reasoning in accordance with French and Belgian law. The tribunal stated that it would not have been entitled to give *res judicata* effects to the prior award's reasons if German law had governed *res judicata*¹¹⁴⁹. In ICC Case No. 7438 of 1994 the arbitral tribunal, applying the procedural law of the canton of Zurich, strictly adhered to the rule that the *res judicata*

¹¹⁴⁷ See MAYER, *Litispence, connexité et chose jugée dans l'arbitrage international*, p. 198.

¹¹⁴⁸ See *supra*, paras 698 *et seq.*

¹¹⁴⁹ See *supra*, paras 474 *et seq.*

effect of a decision attaches only to its *dispositif*. In conformity with Swiss law, the sole arbitrator referred to the reasoning only to determine the meaning and scope of the first award's dispositive part¹¹⁵⁰.

784. The general exclusion of issue preclusion principles should suffer an exception where a particular issue was determined in a prior partial award. Where the parties wanted to have a specific issue settled in a partial award, they also agreed to be bound by the partial award. A subsequent arbitral tribunal should respect the parties' intention to be bound by the partial award by affording it *res judicata* effect¹¹⁵¹. By allowing the prior tribunal to finally decide the specific issue in a partial award, the parties have taken the matter out of the hands of the subsequent tribunal.

785. The same should apply where only one of the parties requested the rendering of the partial award and the prior tribunal granted this request after giving each party the opportunity to explain its position. It appears that policy considerations of coherence, efficiency and finality should prevail over the subsequent arbitral tribunal's interest in reconsidering the particular issue. A party dissatisfied with the partial award should seek revision before the supervisory courts at the arbitral seat. If the partial award is not challenged or upheld by the supervisory courts, the subsequent arbitral tribunal before which the prior partial award is invoked should afford it *res judicata* effect.

786. This being said, the prior partial award's *res judicata* effects should be limited to its dispositive part. The general rule that an award's underlying reasons do not become *res judicata* should also apply with regard to partial awards. There generally appear to be no reasons to treat partial awards differently to full final awards in this respect.

787. An exception to this rule seems only justified where a partial award is invoked before the arbitral tribunal that rendered it. In this situation, the argument as to the lack of interchangeability between different arbitral tribunals obviously cannot justify a narrow approach toward *res judicata*. The policy considerations of procedural efficiency, finality and fairness, as well as of legal coherence and certainty should all prevail over

¹¹⁵⁰ See *supra*, para. 476.

¹¹⁵¹ In this sense, see MAYER, *Litispence, connexité et chose jugée dans l'arbitrage international*, p. 199.

the arbitral tribunal's or a party's interest to reconsider a specific issue decided in a prior partial award¹¹⁵². Likewise, it would be unjust to the parties if an arbitral tribunal was bound by the decision taken in its partial award, but could later contradict the reasons it has given itself as the necessary foundation for that partial award¹¹⁵³. Accordingly, an arbitral tribunal should give *res judicata* effects to its own partial awards and these effects should cover the awards' underlying reasons¹¹⁵⁴.

788. Finally, for the reasons discussed in the first part of this chapter, the cautious approach to abuse of process suggested by ILA in Recommendation No. 5 should be adopted by international arbitral tribunals faced with a prior award¹¹⁵⁵. Subsequent arbitral tribunals should be mindful not to deprive a party of its right to arbitrate a particular question at issue that has not already been decided in a prior award. In international arbitration, the principle of party autonomy gives the parties wide discretion in determining their strategies. Several reasons may justify why a party did not raise a certain claim, cause of action or issue in prior arbitration proceedings. This was expressed in pertinent terms in ILA's final report:

“Costs, psychological influences, relational elements, cross-cultural considerations, persuasiveness, political constraints and other aspects may be responsible for not instituting certain claims or for not raising certain causes of action or issues of fact or law, and caution is in order to avoid *res judicata* amounting to a patronizing review of what parties and counsel ought to have done in managing their case”¹¹⁵⁶.

789. At the same time, it can be argued persuasively that the principle of party autonomy should not entitle a party to hold back claims, causes of action and issues for re-arbitration in subsequent arbitration proceedings that it could and should have raised in good faith in prior arbitration proceedings. The principle of good faith in proceedings requires the parties to an international arbitration to raise all claims that are covered by the parties' arbitration agreement and all causes of action and issues related

¹¹⁵² As was seen above, it is admitted that arbitral tribunals may exceptionally reconsider their prior partial awards if there has been fraud on the tribunal (see *supra*, para. 769).

¹¹⁵³ MAYER, *Litispendence, connexité et chose jugée dans l'arbitrage international*, pp. 200 *et seq.*

¹¹⁵⁴ This solution was adopted by the arbitrator in ICC Case No. 3267, 1984 (see *supra*, para. 478).

¹¹⁵⁵ See *supra*, paras 700 *et seq.*

¹¹⁵⁶ ILA, *Final Report*, para. 60.

to the claim brought in the arbitration as early as possible. Allowing the parties to hold back certain claims, causes of action and issues covered by the arbitration agreement would encourage technical pleadings and multiple proceedings which would be contrary to the objective of international arbitration to provide for a speedy, final and efficient resolution of the parties' dispute in a single forum¹¹⁵⁷.

2.3. Requirements for the Application of the *Res Judicata* Doctrine

790. As was seen above, the requirements that must be met for a prior award to have *res judicata* effect in subsequent arbitration proceedings are set out in ILA's Recommendation No. 3 according to which

“[a]n arbitral award has conclusive and preclusive effects if:

- 3.1 it has become final and binding in the country of origin and there is no impediment to recognition in the country of the seat of the subsequent arbitration;
- 3.2 it has decided on or disposed of a claim for relief which is sought or is being reargued in further arbitration proceedings;
- 3.3 it is based upon a cause of action which is invoked in further arbitration proceedings; and
- 3.4 it has been rendered between the same parties”.

791. The following analysis will briefly consider the triple identity test in the situation where the prior decision relied upon is an arbitral award (2.3.1). It will then examine whether a prior award must be capable of recognition in the country of the arbitral seat of the subsequent arbitration in order to operate as a *res judicata* (2.3.2). The requirement as to the finality of the prior award in its country of origin has already been examined above¹¹⁵⁸.

2.3.1. The triple identity test

792. The rationales underlying the triple identity test are the same regardless of the

¹¹⁵⁷ BORN, pp. 2893 *et seq.*; HASCHER, p. 26.

¹¹⁵⁸ See *supra*, paras 742 *et seq.*

nature of the prior decision¹¹⁵⁹. Therefore, the considerations made above with regard to the identity test in case of prior judgments apply *mutatis mutandis* to the situation where the *res judicata* effect of a prior award is invoked in further arbitration proceedings¹¹⁶⁰.

793. It was argued by Brekoulakis that, because of the limited possibilities to join related parties in arbitration proceedings, a prior award should have certain preclusive and conclusive effects also on related third parties, *i.e.* parties who have not signed the arbitration agreement nor taken part in the prior arbitration process, but who have a close contractual link to the parties in the prior arbitration¹¹⁶¹. According to Brekoulakis, a third party should not be precluded from bringing its claims in a separate arbitration against one of the parties in the prior proceedings. Further, the prior award cannot be enforced by or against the third party. However, a related third party should be bound in subsequent arbitration proceedings by final determinations of legal and factual issues that are common to both proceedings. Brekoulakis proposes to give arbitral tribunals a discretionary power to decide whether a related third party should be bound by the legal and factual determinations of the prior tribunal¹¹⁶².

794. For the reasons discussed above, arbitral tribunals should in principle not be bound by the issues determined in the reasoning of a prior award, even if these determinations were essential to the award¹¹⁶³. This general rule applies with even greater force where the subsequent arbitration involves a related third party, who did not participate in the first arbitration and, therefore, did not have an opportunity to express its opinion on the factual and legal issues decided in the prior award. Hence, a related third party generally should not be bound by the factual and legal determinations made in a prior award between other parties¹¹⁶⁴.

795. However, although a related third party is not bound by a prior award to which

¹¹⁵⁹ See *supra*, para. 707.

¹¹⁶⁰ See *supra*, paras 706 *et seq.*

¹¹⁶¹ BREKOULAKIS, pp. 189 *et seq.*

¹¹⁶² BREKOULAKIS, pp. 198 *et seq.*

¹¹⁶³ See *supra*, paras 779 *et seq.*

¹¹⁶⁴ In this sense, see also MAYER, *Litispentence, connexité et chose jugée dans l'arbitrage international*, pp. 199 *et seq.*

it was not a party, it may nevertheless have to respect the legal situation created by the prior award. This has been submitted by Mayer, invoking the concept known in French law as “*opposabilité aux tiers*”. This means that a party in an arbitration may have to respect an award rendered between other parties in a prior arbitration that finally decides the rights and obligations of those parties. The prior award has *res judicata* effects only between the parties to the prior arbitration. However, the parties to the prior award should be allowed to rely on the award in the subsequent arbitration against the related third party to the extent that it finally determines the legal situation between them. Conversely, the third related party should also be allowed to invoke the conclusive effects of the prior award in the subsequent arbitration against the parties to the prior award¹¹⁶⁵.

796. The application of the “*opposabilité*” principle seems appropriate. If a prior award finally decided the legal situation between A and B, a subsequent arbitral tribunal seized of a related dispute between A, B and C (or only A and C) should be bound by that prior award if the legal situation between A and B arises before it again as a preliminary issue. The prior tribunal had a greater interest in determining the legal situation between A and B than the subsequent tribunal. The same should apply where the legal situation between A and B was finally decided in a prior judgment.

2.3.2. Is the prior award capable of recognition in the country of the arbitral seat of the subsequent arbitration?

797. According to ILA Recommendation No. 3.1 a prior award may only operate as a *res judicata* in subsequent arbitration proceedings if it is capable of recognition in the country of the arbitral seat of the subsequent arbitration.

798. This requirement is at odds with the conception of international arbitration as an arbitral legal order. Recognition entails the transfer of a decision from one legal order to another. If there is an arbitral legal order then there is no such transfer. The prior award, even if rendered in a country other than the country of the subsequent arbitral seat, is not transferred from one legal order to another. Therefore, the question

¹¹⁶⁵ MAYER, *Litispence, connexité et chose jugée dans l'arbitrage international*, p. 200.

of recognition does not arise¹¹⁶⁶.

799. The requirement is also at odds with the reluctance among international arbitral tribunals to scrutinise awards rendered by other arbitral tribunals. It has been suggested that arbitral tribunals do not have the right to verify whether a prior award is capable of recognition in the country of the arbitral seat of the subsequent arbitration. Examining the validity of the prior award would be outside the subsequent tribunal's jurisdiction. If the prior award was not challenged or was upheld by the supervisory courts at the prior arbitral seat, then the subsequent arbitral tribunal must afford the award *res judicata* effects¹¹⁶⁷.

800. However, where a request for recognition of the prior award has already been made before the courts of the arbitral seat of the subsequent tribunal, the latter may deem it appropriate to await the decision of the enforcement court¹¹⁶⁸. If the enforcement court grants recognition and enforcement to the prior award, the subsequent tribunal should respect its *res judicata* effects and refuse to reconsider the dispute to the extent that it was decided in the prior award.

801. If the enforcement court refuses to recognise the prior award the question arises whether the subsequent arbitral tribunal should refuse to grant *res judicata* effect to the prior award and, hence, reconsider the matter. The subsequent arbitral tribunal should in principle not be bound by the decision of the enforcement court. The answer to the question whether it should give *res judicata* effect to an award that was refused recognition should depend on the reason for which recognition and enforcement was refused. If it was refused for one of the grounds listed in Article V (1) NYC, the subsequent arbitral tribunal may prefer not to give *res judicata* effects to the prior award. Where one of these grounds is present, the prior award may also have been annulled in its country of origin. It is also possible that the prior award will not be recognised in other Contracting States to the New York Convention. Therefore, because it is possible

¹¹⁶⁶ HASCHER, p. 28.

¹¹⁶⁷ Commentary to ICC Case No. 3383, 1979, p. 398. Landolt states that arbitral tribunals are not bound by the recognition requirements set out in the New York Convention; these only apply to state courts (LANDOLT, para. 8-15).

¹¹⁶⁸ MAYER, *Litispence, connexité et chose jugée dans l'arbitrage international*, pp. 202 *et seq.*

that the prior award will not have effects in a majority of countries, the subsequent arbitral tribunal should not afford it *res judicata* effect¹¹⁶⁹. In this case the award will not be “valid” for *res judicata* purposes¹¹⁷⁰.

802. However, where the prior award was not annulled in its country of origin and was refused recognition for one of the grounds listed in Article V (2) NYC, the subsequent arbitral tribunal may decide to still give *res judicata* effect to the prior award. Article V (2) NYC entitles the enforcement court to refuse recognition and enforcement of an award if the subject matter in the arbitration was not arbitrable according to the law of the country where recognition or enforcement is sought, or if the award is contrary to the public policy of that country. Because these grounds concern only the law of the enforcement country and, hence, local particularities, the award may still be recognised and enforced in other Contracting States of the New York Convention. This means that the award is not generally deprived of its effectiveness, but only in the country where the subsequent arbitral tribunal has its seat. Accordingly, where a prior award was refused recognition in the country of the arbitral seat for one of the grounds listed in Article V (2) NYC, the subsequent arbitral tribunal should make an assessment as to whether the prior award can still be recognised and enforced in other countries. If this is the case, it may decide to give *res judicata* effect to the prior award, always making sure that its award will not be set aside for granting *res judicata* effect to an award that is contrary to Article V (2) NYC at the arbitral seat.

2.4. Conclusion

803. Awards are generally recognised to have *res judicata* effects. Applying the transnational law method, arbitral tribunals should determine autonomously the type of awards capable of operating as a *res judicata* in subsequent arbitral proceedings. This should apply to full and partial awards that finally resolve a specific issue affecting the rights and obligations of the parties. These awards can generally be challenged before the supervisory courts at the arbitral seat, as well as recognised and enforced under the New York Convention.

¹¹⁶⁹ See BORN, pp. 2924-2929.

¹¹⁷⁰ See *supra*, paras 746 *et seq.*

804. In order to become *res judicata*, awards must be final, in the sense that they can no longer be modified by the tribunal that rendered it. While arbitral tribunals should not necessarily have to wait until the award can no longer be challenged to afford it *res judicata* effects, this may be preferable. Finally, all final arbitral awards (full and partial) should be considered as “on the merits” for *res judicata* purposes. While arbitral tribunals should generally be entitled to determine their own jurisdiction, affording preclusive effects to prior jurisdictional awards will likely be appropriate in most cases.

805. Arbitral awards that qualify as *res judicata* may give rise to claim preclusive effects in subsequent arbitrations. In general, these claim preclusive effects should not extend to the award’s underlying reasoning. Consequently, awards should not give rise to issue preclusive effects. Final determinations of specific issues that were essential to the prior (full) final award may only have *res judicata* effects in subsequent arbitration proceedings where they were decided in a partial award. While an award’s reasoning generally has no *res judicata* effect, a partial award’s underlying reasoning should be binding on the tribunal that rendered it. If an arbitral tribunal should in general not be bound by a prior award’s underlying reasoning, it should in any case give due consideration to these reasons in order to avoid inconsistent awards.

806. Furthermore, claims, causes of action and issues that were not raised and decided in a prior award should be covered by the award’s *res judicata* effects, if (and only if) the raising of such claim, cause of action or issue in the subsequent arbitration would constitute an abuse of process or procedural unfairness.

807. With regard to the requirements that must be met for an award to operate as a *res judicata*, arbitral tribunals should apply the triple identity test to verify that the prior award involved the same parties and issues. Where the prior award has been refused recognition or enforcement in the country of the subsequent arbitration for one of the grounds listed in Article V (1) NYC, the subsequent arbitral tribunal may prefer not to give the award any *res judicata* effects.

3. TRANSNATIONAL *RES JUDICATA* PRINCIPLES FOR INTERNATIONAL COMMERCIAL ARBITRAL TRIBUNALS

808. In light of the above findings, we may now attempt to formulate transnational *res judicata* principles for international arbitrators to help them determine the *res judicata* effects of prior judgments and awards in arbitration proceedings. Using the ILA recommendations on *res judicata* and arbitration as a model, we adapted them in accordance with the findings made above.

809. The *res judicata* principles with respect to judgments are largely identical to the principles concerning awards. However, for reasons of clarity, they are considered separately.

3.1. Transnational *Res Judicata* Principles with Respect to Prior National Court Judgments

“1. To promote efficiency and finality of international commercial arbitration, ~~arbitral awards national court judgments should~~ shall have conclusive and preclusive effects in further arbitral proceedings.

Comment: As an exception to the general rule, to strengthen the arbitral tribunal’s competence-competence, prior court rulings on the jurisdiction of the arbitral tribunal should not have *res judicata* effect in subsequent arbitration proceedings. However, arbitral tribunals shall take such prior jurisdictional rulings into consideration to avoid positive or negative conflicts of jurisdiction.

Likewise, a judgment granting interim relief should not be binding in the subsequent arbitration on the party that did not request the relief.

2. The conclusive and preclusive effects of ~~arbitral awards national court judgments~~ in further arbitral proceedings set forth below ~~need not necessarily be governed by national law and may~~ should shall be governed by transnational rules applicable to international commercial arbitration.

Comment: To ensure that arbitral tribunals will apply transnational *res judicata* principles it is preferable to erase the reference to national laws. However, arbitral tribunals may

have to consult the law of the country where the judgment was rendered to verify the judgment's *res judicata* status. This may be necessary, in particular, to determine whether the judgment was rendered by a judicial court or tribunal and whether it has become final and binding for *res judicata* purposes. National laws should be referred to for guidance only.

~~3. An arbitral award~~ ***A national court judgment has conclusive and preclusive effects in further arbitral proceedings if:***

3.1 it has become final and binding in the country of origin and there is no impediment to recognition in the country of the place of the subsequent arbitration and was rendered in conformity with Article II (3) of the New York Convention and due process principles;

Comment: This refers to the “validity” requirement. Where a judgment is capable of recognition in the country of the arbitral seat, it will generally also be “valid”. However, the opposite may not always be true. It may be preferable to replace the requirement of a judgment capable of recognition in the country of the arbitral seat by the validity requirement to take account of the autonomous nature of international commercial arbitration.

3.2 it has decided on or disposed of a claim for relief which is sought or is being reargued in the further arbitration proceedings;

3.3 it is based upon a cause of action which is invoked in the further arbitration proceedings or which forms the basis for the subsequent arbitral proceedings; and

3.4 it has been rendered between the same parties.

~~4. An arbitral award~~ ***A national court judgment has conclusive and preclusive effects in the further arbitral proceedings as to:***

4.1 determinations and relief contained in its dispositive part as well as in all reasoning necessary thereto;

4.2 issues of fact or law which have actually been arbitrated and determined by it, provided any such determination was essential or fundamental to the dispositive part of the arbitral award.

~~5. An arbitral award~~ ***A national court judgment has***

preclusive effects in the further arbitral proceedings as to a claim, cause of action or issue of fact or law, which could have been raised, but was not, in the proceedings resulting in that ~~award~~ *judgment*, provided that the raising of any such new claim, cause of action or new issue of fact or law amounts to procedural unfairness or abuse.

~~6. The conclusive effects of an arbitral award can be invoked in further arbitration proceedings at any time permitted under the applicable procedure.~~

~~7. The preclusive effects of an arbitral award need not be raised on its own motion by an arbitral tribunal. If not waived, such preclusive effects should be raised as soon as possible by a party. If not waived, a party shall raise the conclusive and preclusive effects of an arbitral award a national court judgment as soon as possible. The arbitral tribunal must not raise such effects on its own motion.~~

Comment: Because it is considered that both the positive and negative *res judicata* effect are fundamentally identical in nature and should pertain to procedure, there is no reason to treat these effects differently.

3.2. Transnational *Res Judicata* Principles with Respect to Prior Arbitral Awards

1. To promote efficiency and finality of international commercial arbitration, arbitral awards ~~should~~ *shall* have conclusive and preclusive effects in further arbitral proceedings.

2. The conclusive and preclusive effects of arbitral awards in further arbitral proceedings set forth below ~~need not necessarily be governed by national law and may should~~ *shall* be governed by transnational rules applicable to international commercial arbitration.

Comment: The *res judicata* effects of a prior arbitral award should be governed by transnational rules. Any reference to national laws should be for guidance only. Arbitral tribunals may have to consult the *lex arbitri* of the prior award to determine whether it is final for *res judicata* purposes.

3. A *valid* arbitral award has conclusive and preclusive effects in further arbitral proceedings if:

3.1 it is final and binding ~~in the country of origin and there is no impediment to recognition in the country of the place of the subsequent arbitration;~~

Comment: Mirroring Article V (1)(e) NYC, an award may be considered as final if it can no longer be modified in appeal proceedings. Arbitral tribunals will have to consult the prior award's *lex arbitri* to determine whether this is the case. Likewise, for reasons of coherence and efficiency it may be appropriate for arbitral tribunals to grant *res judicata* effects to awards only if they can no longer be challenged at the arbitral seat.

As with regard to judgments, to respect the autonomy of international arbitration the validity requirement replaces the requirement that the prior award be capable of recognition at the place of arbitration of the subsequent arbitral tribunal. An award should generally be considered as "valid" if it was not annulled by the supervisory courts at the prior arbitral seat and if it cannot be refused recognition or enforcement for one of the grounds listed in Article V (1) NYC.

3.2 it has decided on or disposed of a claim for relief which is sought or is being reargued in the further arbitration proceedings;

3.3 it is based upon a cause of action which is invoked in the further arbitration proceedings or which forms the basis for the subsequent arbitral proceedings; and

3.4 it has been rendered between the same parties.

4. An arbitral award has conclusive and preclusive effects in the further arbitral proceedings as to:

4.1 determinations and relief contained in its dispositive part ~~as well as in all reasoning necessary thereto;~~

Comment: As an exception to the general rule, the underlying reasoning of a partial award should be covered by the award's *res judicata* effect before the arbitral tribunal that rendered it.

4.2 ~~issues of fact or law which have actually been arbitrated and determined by it, provided any such determination was essential or fundamental to the dispositive part of the arbitral award.~~

Comment: As an exception to the general rule, final determinations of issues of fact or law which were essential to

the full final award should only have *res judicata* effects if decided in a partial award.

5. An arbitral award has preclusive effects in the further arbitral proceedings as to a claim, cause of action or issue of fact or law, which could have been raised, but was not, in the proceedings resulting in that award, provided that the raising of any such new claim, cause of action or new issue of fact or law amounts to procedural unfairness or abuse.

~~6. The conclusive effects of an arbitral award can be invoked in further arbitration proceedings at any time permitted under the applicable procedure.~~

~~7. The preclusive effects of an arbitral award need not be raised on its own motion by an arbitral tribunal. If not waived, such preclusive effects should be raised as soon as possible by a party. *If not waived, a party shall raise the conclusive and preclusive effects of an arbitral award as soon as possible. The arbitral tribunal must not raise such effects on its own motion.*~~

CONCLUSION

*We are here in a dynamic area of law,
well able to embrace new situations as
justice requires.*

(Simon Brown J.)

810. The doctrine of *res judicata* as developed in domestic laws prohibits the re-litigation of a dispute that has finally been adjudged by a judicial court or tribunal. Affording finality to judgments, it puts an end to the dispute. The same dispute cannot be re-litigated again between the same parties.

811. The central question that we proposed to investigate in this research was whether international commercial arbitral tribunals should apply the traditional *res judicata* doctrine to coordinate their relations with state courts and other arbitral tribunals. Should they apply the same *res judicata* principles as state courts to determine the effects of a prior judgment or award in the subsequent arbitration?

812. The main thesis underlying this research was that international commercial arbitral tribunals should develop transnational *res judicata* principles, *i.e.* generally accepted *res judicata* principles that respect the nature and objectives of international commercial arbitration.

813. The reasons that justify this thesis may be succinctly summarised as follows:

814. In Chapters One and Two of this research we showed that there is no uniform *res judicata* doctrine. Although the *res judicata* doctrine is recognised as a general principle of law inherent to all legal systems, there are several important differences among domestic laws with respect to *res judicata*. These differences are mirrored in public international law. While general *res judicata* principles have been developed in public international law, it was seen that there is great uncertainty among international courts and tribunals in particular with regards to the scope and requirements of *res judicata*. By contrast, private international law instruments do not contain provisions on *res judicata*, focusing instead on the avoidance of parallel proceedings.

815. In Chapters Three and Four we saw that judgments and awards may give rise to *res judicata* issues before arbitral tribunals in a myriad of different situations. However, international arbitration law contains no rules that go beyond stating the general principle that awards have *res judicata* effects. While the recent ILA recommendations on *res judicata* and arbitration provide useful guidance to international arbitral tribunals, they leave many questions open. They also do not cover the situation where an arbitral tribunal is faced with a prior national court judgment. Furthermore, save for few exceptions, there is no established practice among arbitral tribunals with regard to *res judicata*. This has allowed us to conclude that the way in which international arbitration law and practice currently deals with the problem of *res judicata* is not satisfactory.

816. In Chapter Five we showed that international arbitral tribunals should not apply any particular domestic law to *res judicata*, but should develop transnational *res judicata* principles. The transnational approach to *res judicata* in international arbitration is appropriate because it best reflects the autonomous and inherently transnational nature of international commercial arbitration. It also has the great advantage of providing a uniform set of *res judicata* principles for international arbitral tribunals, which will improve legal coherence and certainty. Finally, the transnational approach allows arbitral tribunals to adapt traditional *res judicata* principles to better meet the objectives of international commercial arbitration.

817. Finally, in Chapter Six we determined the content of the transnational *res judicata* principles that international arbitral tribunals should apply to determine the effects of

prior judgments and awards in subsequent arbitration proceedings. As a conclusion to Chapter Six, we adapted the ILA recommendations on *res judicata* and arbitration in accordance with our findings.

818. This research on the *res judicata* doctrine before international arbitral tribunals did not aim to close the debate on the topic. This would have been both a presumptuous and impossible goal to achieve. It would be presumptuous to pretend to have found “final” answers to the complex problems that *res judicata* raises before international arbitral tribunals (it is indeed doubtful whether there is such a thing as a “final” answer in legal matters¹¹⁷¹). Due to the limited scope of this research, it would also have been impossible to suggest solutions to all of the questions that the *res judicata* doctrine poses in international arbitration. For this reason several questions had to be left open, such as the standard of interpretation to be given to the triple identity test in international arbitration. Some questions could only be raised but not analysed, such as the *res judicata* effect of decisions rendered by supra-national courts and tribunals before an international commercial arbitral tribunal. Finally, some questions could not even be raised, e.g. whether the same or similar transnational *res judicata* principles should apply in international investment arbitration.

819. Rather than to close the debate, the aim of this research was to clarify the problem of *res judicata* in international arbitration. It was to show the reality and magnitude of the problem and to offer some solutions. This research was intended to cast some light on a problem that has given rise to many questions and much uncertainty in international arbitration and that, due to the growing complexity of international arbitration and litigation, is expected to arise more and more frequently in the future.

820. The question of *res judicata* in international arbitration is only one aspect of a greater problem in international arbitration, which is the coordination of jurisdictions between arbitral tribunals and other national, international and supra-national courts and (arbitral) tribunals. The parallel coexistence of these courts and tribunals, coupled with the increasing complexity of international disputes that involve a multitude of

¹¹⁷¹ LALIVE, *Transnational (or Truly International) Public Policy*, para. 2.

closely related parties, contracts and issues, will inevitably lead to conflicts of jurisdiction. These conflicts not only raise questions of *res judicata*, but also of the applicability of other jurisdiction-regulating mechanisms, such as *lis pendens*, *forum non conveniens*, as well as consolidation and joinder.

821. These issues stand witness not only for the increasing complexity of international arbitration, but also for its development. International arbitration can no longer be considered as a “second-class method”¹¹⁷² of dispute resolution. It is an alternative method that coexists in parallel with other dispute resolution mechanisms. They also indicate that because of international arbitration’s expansion, arbitral tribunals will constantly face new problems which always raise the same question: should the same solutions as those developed in litigation to coordinate the relations between domestic courts also apply in international arbitration or do the particularities of international arbitration call for different solutions and, if so, which ones.

¹¹⁷² HANOTIAU, *Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues*, p. 256.

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TABLE OF ABBREVIATIONS

| | |
|------------------|---|
| AAA | American Arbitration Association |
| <i>Ab initio</i> | From the beginning |
| <i>Ad hoc</i> | To this; formed for or concerned with one specific purpose |
| AFDI | Annuaire Français de Droit International |
| AJIL | American Journal of International Law |
| ALI | The American Law Institute |
| BC | 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters |
| BCLR | British Columbia Reports |
| CCSBT | 1993 Convention for the Conservation of Southern Bluefin Tuna |
| <i>Cf</i> | <i>conferre</i> (compare) |
| CIETAC | China International Economic and Trade Arbitration Commission |
| Com Cas | Commercial Cases |
| consid. | <i>Considérant</i> (reasoning) |
| <i>Contra</i> | In contrast/opposition to; against |
| CRCICA | Cairo Regional Center for International Commercial Arbitration |
| DR | Decisions and Reports of the European Court of Human Rights |
| Doug KB | Douglas' Reports, King's Branch |

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| DTF | Decision of the Tribunal Fédéral (Supreme Court; Switzerland) |
| EAA 96 | English Arbitration Act of 1996 |
| EC | European Council |
| ECHR | European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11) |
| ECJ | Court of Justice of the European Union |
| ECR | Reports of the Court of Justice of the European Union |
| ed. | Editor or edition |
| eds. | Editors |
| EFTA | European Free Trade Association |
| <i>e.g.</i> | <i>exempli gratia</i> (for example) |
| <i>et seq.</i> | <i>et sequentes</i> or <i>et sequentia</i> (and the following) |
| <i>etc.</i> | <i>et cetera</i> (and so forth) |
| F | Federal Reporter (United States) |
| Fasc. | Bundle |
| FCR | Federal Court Reports (Australia) |
| FF | Feuilles fédérales (Switzerland) |
| Fn | Footnote |
| F Supp | Federal Supplement (United States) |
| Hare | Hare's Reports, Chancery |
| <i>Ibid.</i> | In the same place |
| ICC | International Chamber of Commerce |

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|-------------------------|---|
| ICJ | International Court of Justice |
| ICSID | International Centre for Settlement of Investment Disputes |
| IDI | Institut de Droit International |
| <i>i.e.</i> | <i>id est</i> (that is) |
| ILA | International Law Association |
| ILM | International Legal Materials |
| ILO | International Labour Organization |
| ILOAT | International Labour Organization Administrative Tribunal |
| ILR | International Law Reports |
| <i>in limine litis</i> | At the start of the procedure |
| <i>Inter alia</i> | Among other things |
| ITLOS | International Tribunal for the Law of the Sea |
| JR | Judgement Regulation (EC Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) |
| JDI | Journal du Droit International |
| LCIA | London Court of International Arbitration |
| Lloyd's Rep. | Lloyd's Law Reports |
| <i>Mutatis mutandis</i> | With respective differences taken into consideration |
| NAI | Netherlands Arbitration Institute |
| No. | Number |

| | |
|-----------|---|
| p. | Page |
| PCIJ | Permanent Court of International Justice |
| PCA | Permanent Court of Arbitration |
| PILA | Private International Law Act (Switzerland) |
| pp. | Pages |
| PWC | PriceWaterhouseCoopers |
| RabelsZ | Rabels Zeitschrift |
| RCADI | Recueil des cours (Academie de Droit International) |
| Rev. arb. | Revue de l'arbitrage |
| RGDIP | Révue Générale de Droit International Public |
| RIAA | Reports of International Arbitral Awards, United Nations |
| RSDIE | Revue suisse de droit international et de droit européen |
| SAA 99 | Swedish Arbitration Act of 1999 |
| SCC | Stockholm Chamber of Commerce |
| Ser. A | PCIJ Documents, Series A (Judgments) |
| Ser. A/B | PCIJ Documents, Series A/B (Judgments and Advisory Opinions) |
| Ser. B | PCIJ Documents, Series B (Advisory Opinions) |
| SIA | School of International Arbitration at Queen Mary and Westfield College, University of London |
| SIAC | Singapore International Arbitration Centre |

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| SLR | Singapore Law Review |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCLOS | United Nations Convention on the Law of the Sea |
| US | United States Reports |
| USC | United States Code |
| <i>v</i> | <i>versus</i> (against) |
| Vol. | Volume |
| WIPO | World Intellectual Property Organization |
| YCA | Yearbook Commercial Arbitration |
| ZPO | Zivilprozessordnung (Germany) |